A

AM-EL HOLDINGS SDN BHD & ORS

v.

AEH CAPITAL SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
RAUS SHARIF JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NOS: W-02-665-2004 & W-02-619-2000]

C

6 JUNE 2008

MONEYLENDERS: *Loan on security - Land charged as security - Foreclosure proceedings - Recovery of debt - Exemption by Minister - Guarantors - Whether loan agreement illegal - Moneylenders Act 1951,*

D

s. 2A(2)

LAND LAW: *Charge - Order for sale - Cause to the contrary - Loan agreement - Guarantors - Debt due - Whether loan agreement illegal*

CONTRACT: *Loan - Security for loan - Charge - Sale of land -*

E

Guarantors - Debt due - Whether loan agreement illegal

The following two appeals were heard together. The first appeal ('OS Appeal') was by the plaintiff, one AEH Capital Sdn Bhd ('AEH'), against the decision of the High Court judge dismissing

F

an originating summons ('D2 OS') filed by AEH for foreclosure proceedings against the defendant, one AM-EL Holdings Sdn Bhd ('AM-EL'). The second appeal ('Civil Suit Appeal') was by the defendants – AM-EL, one Tempamas Sdn Bhd ('TSB') and one Low Koon Chuan ('Low') (TSB and Low to be referred to as

G

'Guarantors' jointly) – against the decision of another High Court judge allowing AEH's claim and dismissing the defendants' counterclaim pertaining to a civil suit ('D5 Civil Suit') in which AEH sought to recover outstanding monies against the defendants. It was common ground that the D2 OS and the D5 Civil Suit

H

were based on practically the same facts.

A loan agreement dated 4 June 1996 was executed between AM-EL and AEH, with 47 condominium units as security for the loan of RM4,000,000. TSB and Low each executed a guarantee and

I

indemnity dated 4 June 1996 according to which TSB and Low unconditionally, jointly and severally agreed and undertook that

they, as principal debtor and not merely as surety, upon demand, repay in full all sums under the loan agreement. *Vide* the D2 OS, AEH applied for orders for sale of the 47 condominium units that had been charged to it by AM-EL. In opposing the D2 OS, AM-EL alleged that the loan agreement was not in compliance with the Moneylenders Act 1951 ('Act') and contended that the loan transaction was unlawful and should be set aside. AM-EL's case was that there was in existence an oral agreement in which AEH had agreed to furnish a proper statement of account and to release 22 condominium units that had been charged to AEH upon payment of RM1,500,000 towards the loan. It was contended that although RM1,500,000 had been paid, AEH had failed to release the 22 condominium units which resulted in AM-EL suffering losses. The High Court judge dismissed AEH's application for orders for sale of the condominium units. The Exemption Order under s. 2A(2) of the Act accorded to AEH by the Minister of Housing and Local Government was only applicable if the loan granted had been utilised in respect of a share financing transaction. As the Exemption Order under s. 2A(2) of the Act had been challenged, it was incumbent upon AEH to produce evidence to respond to that challenge. The onus lay upon AEH to hold out the relevant share purchase agreement and the price of the shares. AEH's failure to annex documents to their affidavit showing that the loan was in respect of a share financing scheme to purchase the paid-up capital of one Mahabudi Development Sdn Bhd ('Mahabudi') was held to be fatal.

By the D5 Civil Suit, AEH sought to recover the balance outstanding sum as at 15 December 1998 against the defendants. The defendants counterclaimed for damages, special damages as well as several declaratory orders: firstly, for an order that the loan agreement was wrongful and illegal; secondly, that the Exemption Order granted to AEH was *ultra vires* the powers of the Minister granting it. The defendants prayed for the following consequential orders should the court rule in their favour: that AEH was not entitled to enforce the loan agreement; that any guarantee and/or indemnity given by TSB and Low to AEH be declared void; and for AEH to provide a true account of all payments received from AM-EL. The D5 Civil Suit proceeded on three issues: (i) whether the loan granted by AEH referred to in the statement of claim was settled on 24 April 1997; (ii) whether a new loan without a valid

A exemption of the Minister operated with effect from 25 April 1997; and (iii) whether the exemption granted to AEH by the Minister of Housing and Local Government exempting AEH from the provisions of the Act was valid. The High Court judge in this case entered judgment in favour of AEH and dismissed the
B defendants' counterclaim. The situation before this court at the commencement of hearing these two appeals was that, in respect of one loan transaction involving the same parties, the same facts and practically identical issues, two courts of co-ordinate jurisdiction had delivered conflicting decisions. In the D5 Civil
C Suit, AEH had obtained judgment against AM-EL, TSB and Low – pursuant to which it was permissible for AEH to execute against assets belonging to them – but was, however, precluded by the court order in the D2 OS from realising properties which had been specifically charged to it by AM-EL as security for the loan
D granted. As for AM-EL, it had successfully defended the D2 OS and precluded AEH from foreclosing on the properties that had been charged by it to AEH as security for the loan which they had taken but, however, was confronted with the judgement entered against it in the D5 Civil Suit.

E

Held (allowing the OS Appeal and dismissing the Civil Suit Appeal)

Per Zaleha Zahari JCA delivering the majority judgment of the court:

F

(1) It was abundantly clear from the licenses issued that AEH was in possession of a moneylending licence under s. 5 of the Act. It was also evident from Gazette No. PU(B) 242/1996 that an Exemption Order under s. 2A(2) of the Act had been
G issued to AEH by the Minister of Housing and Local Government on 15 May 1996 according to which AEH was exempted from the provisions of the Act in respect of, *inter alia*, "credit leasing/share financing" for a period of three years with effect from 9 March 1996, which exemption was
H subsequently extended for another period of three years from 9 March 1998 upon the same terms. In this circumstance, AEH was at all material times a licensed moneylender and pursuant to the Exemption Order issued, activities of money lending entered into by AEH relating to credit leasing/share
I financing were exempted from the provisions of the Act, subject to the conditions set out in para. (b) of the Exemption

Order. Furthermore, the Minister empowered to grant the exemption under s. 2A(2) of the Act is the Minister of Housing and Local Government, not the Minister of Finance as contended by the appellants in the Civil Suit Appeal and the respondents in the OS Appeal. The Exemption Order PU(B) 242/96 was valid and full of legal effect. By reason of this Exemption Order issued, in respect of any loan given to AM-EL related to credit leasing/share financing AEH was entitled to impose terms and conditions inconsistent with the provisions of the Act. (paras 20, 21, 22, 28)

(2) The record showed that a cheque for RM4,000,000 was issued by one Hendersons (Malaysia) Sdn Bhd ('Hendersons') on 24 April 1997 where AEH was named as payee. This cheque must not be considered in isolation but must be read against the backdrop of all the contemporaneous documents issued by the parties. On the facts, it was clear that, consequential upon receipt of AEH's reminder letter dated 17 April 1997 to AM-EL of the loan of RM4,000,000 being due for settlement on 25 April 1997, AM-EL had *vide* letter dated 23 April 1997 expressed its intention to repay only RM1,500,000 towards the loan and requested an extension of time of six months from 30 April 1998 to repay the balance of RM2,500,000. This request was duly approved by AEH upon terms on 24 April 1997 and subsequently accepted by AM-EL and the Guarantors. The undisputed fact was the approval of the extension of time to pay RM2,500,000 was the same date of receipt of Henderson's cheque towards the amount outstanding on AM-EL's loan, arising from which AEH duly issued an official receipt bearing the date 24 April 1997. Taking this into account, the sum of RM2,242,876.71 which was paid to AM-EL was clearly attributable to the extension of time to pay RM2,500,000 upon the agreed terms. It would thus appear as the time for the payment of RM2,500,000 had been extended, this amount as well as the amount representing the agreed terms had been taken into account, as well as the RM4,000,000 attributable to the cheque issued by Hendersons. Taking into consideration the events that had transpired, somewhat simultaneously, there was continuity of the loan agreement dated 4 June 1996. The sum of RM2,242,876.71 which AM-EL duly banked in and debited from AEH's account did not constitute a new and separate loan. (paras 45, 48 & 49)

(3) There was no evidence that AEH was in *pari delicto* and that they had knowledge when it loaned the monies that AM-EL did or did not intend to purchase the Mahabudi shares. If AM-EL did not purchase the Mahabudi shares as it said it would, this court should not and must not lend its aid to enable AM-EL to take advantage of its own default by relying on its own breach to avoid its obligations to escape payment under the loan agreement. It was AM-EL's responsibility to ensure that the term loan applied for, which had been granted by AEH, had in fact been utilised to purchase Mahabudi shares. On the facts of this case, there was sufficient evidence that the loan granted to AM-EL by AEH was in respect of a share financing transaction, and that AEH was not in breach of the condition imposed by the Minister in the Exemption Order in granting the loan that it did to AM-EL. In the circumstances, AM-EL was estopped from denying that the loan given was to finance the purchase of shares in Mahabudi as reflected in the loan agreement, the directors' circular resolution and the contemporaneous documents executed. The legal principle *ex turpi causa* applied; AM-EL was not to benefit from its own wrongdoing. AM-EL was contractually bound by the terms in the loan agreement to pay the interest that had been agreed upon. Pursuant to the exemption, AEH was not in breach in imposing terms and conditions contrary to s. 22 of the Act. AM-EL was liable to pay the amount claimed. (paras 73, 74 & 75)

(4) The Guarantors, pursuant to the guarantee and indemnity, had unconditionally jointly and severally agreed and undertook that they would as principal debtor and not merely as surety, upon demand, repay in full all sums under the loan agreement or such amount as may be outstanding together with all interests, costs and charges due and payable under the loan agreement. The guarantee was legal and enforceable. A statement by an officer of AEH as to the monies and liabilities for the time being due or incurred from the borrower to AEH shall be conclusive evidence in any legal proceedings against the Guarantors (cl. 3(u)). AEH was entitled to recover from the Guarantors all sums payable to AEH without first availing of their legal remedies against the borrower and/or any other surety and/or any security that AEH had against the borrower

or any other persons. In view of the courts finding that AM-EL was indebted to AEH in the amount claimed, the Guarantors were also liable to pay in respect of the amount claimed. (para 76)

(5) To conclude, the High Court judge erred in dismissing the D2 OS. The matters raised by AM-EL did not constitute cause to the contrary. The High Court judge in the D5 Civil Suit, on the other hand, was right in allowing AEH's claim and in dismissing AM-EL's counterclaim. (paras 77 & 78)

Per Abdul Malik Ishak JCA (dissenting):

(1) There was neither any unconscionable conduct on the plaintiff's part nor had there been any undue influence exerted by the plaintiff. The loan agreement was not harsh, unconscionable or illegal. The loan, meant for the purchase of the Mahabudi shares, was legally done and therefore enforceable. The rate of interest was agreed to by the first defendant (AM-EL) and thus was not excessive. The parties also agreed to the advisory fees. (para 161)

(2) The Ministerial exemption that was accorded to the plaintiff expired on 8 March 1998. And if the submission by the first and third defendants that there were two loans were to be accepted, these two loans would technically still be covered by the Ministerial exemption. On the facts, Hendersons, on 24 April 1997, paid RM4 million to the plaintiff for payment of the loan amounting to RM4 million. This meant that the first defendant had overpaid the plaintiff by RM1.5 million in respect of the first loan, which amount would be more than sufficient to pay whatever interests the plaintiff may impose. And since the first loan had been repaid in full, there was no necessity to foreclose all the 47 condominium units by way of an auction sale. In regard to the second loan which was for the sum of RM2,242,876.71, which sum was by way of a cheque dated 25 April 1997 in favour of the first defendant from the plaintiff, it was not supported by any loan agreement. The payment voucher for the disbursement of the sum of RM2,242,876.71 stated that it was for the drawdown of the term loan. But the term loan for the sum of RM4 million had already been drawndown on 5 June 1996 and there was nothing left to drawdown again. Evidence wise, this cheque of

RM2,242,876.71 was cleared on 30 April 1997. There was no evidence that the second loan was meant for credit leasing or share financing. As far as the second loan was concerned, it was illegal and unenforceable. The first loan, however, had all the trappings of legality. Calculation wise, if the sum of RM2,242,876.71 was deducted by the sum of RM1.5 million, a sum of RM742,876.71 would remain and it was this sum which the plaintiff advanced to the first defendant on an *ex gratia* basis. The sum of RM742,876.71 must be construed to lay where it fell. The repayments of RM1.5 million and RM4 million to the plaintiff could not be "swept under the carpet", so to speak. Such repayments must be construed in its correct perspective and when so construed, the net result would show that the loan of RM4 million had been repaid in full to the plaintiff. (paras 162, 163, 164, 165, 166 & 167)

(3) For the above reasons, the plaintiff's appeal in regard to the foreclosure proceedings in D2 OS must be dismissed. In respect of the D5 Civil Suit, the appeal must be allowed. Accordingly, the first and third defendants' counterclaim ought to be dismissed since they succeeded in their arguments pertaining to the second loan. (para 168)

Bahasa Malaysia *Translation Of Headnotes*

Dua rayuan di sini didengar secara serentak. Rayuan pertama ('Rayuan OS') oleh plaintif, AEH Capital Sdn Bhd ('AEH'), adalah terhadap keputusan hakim Mahkamah Tinggi kerana menolak saman pemulanya ('OS D2') terhadap defendan, iaitu AM-EL Holdings Sdn Bhd ('AM-EL'). Rayuan kedua ('Rayuan Guaman Sivil') oleh defendan-defendan – AM-EL, Tempamas Sdn Bhd ('TSB') dan seorang Low Koon Chuan ('Low') (TSB dan Low akan dirujuk sebagai 'Penggerenti' secara bersesama) – adalah terhadap keputusan seorang lagi hakim Mahkamah Tinggi kerana membenarkan tuntutan AEH dan menolak tuntutan balas defendan-defendan dalam satu guaman sivil ('Guaman Sivil D5') di mana AEH menuntut sejumlah hutang tertunggak dari defendan-defendan. Tidak dinafikan OS D2 dan Guaman Sivil D5 adalah secara praktiknya berasaskan fakta yang sama.

Satu perjanjian pinjaman bertarikh 4 Jun 1996 telah dimeterai di antara AM-EL dan AEH, dengan 47 unit kondominium dijadikan sandaran bagi pinjaman berjumlah RM4,000,000. TSB dan Low masing-masing memeterai gerenti dan indemniti bertarikh 4 Jun

1996 berdasarkan mana, TSB dan Low, tanpa syarat dan secara bersesama dan berasingan, bersetuju dan berjanji bahawa mereka, selaku penghutang utama dan bukan semata-semata sebagai penjamin, akan membayar, atas tuntutan, jumlah penuh yang dinyatakan di dalam perjanjian pinjaman. Melalui OS D2, AEH memohon perintah penjualan bagi kesemua 47 unit kondominium yang digadaikan kepadanya oleh AM-EL. Membantah OS D2, AM-EL mendakwa bahawa perjanjian pinjaman tidak mematuhi Akta Pemberipinjam Wang 1951 ('Akta') sambil berhujah bahawa transaksi pinjaman tak sah dan perlu diketepikan. Kes AM-EL adalah bahawa terdapat satu perjanjian lisan di mana AEH bersetuju untuk membekalkan penyata akaun yang teratur dan melepaskan 22 unit kondominium yang digadaikan kepada AEH atas pembayaran balik sebahagian pinjaman sebanyak RM1,500,000. Dihujahkan bahawa walaupun jumlah RM1,500,000 tersebut telah dibayar, AEH gagal melepaskan 22 unit kondominium tersebut sekaligus menyebabkan kerugian kepada AM-EL. Hakim Mahkamah Tinggi menolak permohonan AEH untuk perintah jualan terhadap unit-unit kondominium. Alasannya adalah bahawa Perintah Pengecualian di bawah s. 2A(2) Akta yang diberi kepada AEH oleh Menteri Perumahan dan Kerajaan Tempatan hanya berkuatkuasa jika pinjaman yang diberikan itu digunakan untuk transaksi pembiayaan saham. Selanjutnya, oleh kerana Perintah Pengecualian di bawah s. 2A(2) Akta itu telah dicabar, maka menjadi tanggungjawab AEH untuk mengemukakan keterangan bagi menjawab cabaran tersebut. Beban adalah atas AEH bagi mempertahankan perjanjian pembelian saham yang berkenaan serta harga saham-saham tersebut. Kegagalan AEH untuk mengepilkan dokumen-dokumen dalam afidavit mereka bagi menunjukkan bahawa pinjaman adalah berkaitan skim pembiayaan saham bagi membeli modal berbayar syarikat Mahabudi Development Sdn Bhd ('Mahabudi') adalah fatal.

Melalui Guaman Sivil D5, AEH menuntut untuk mendapat kembali jumlah tertunggak setakat 15 Disember 1998 dari defendan-defendan. Defendan-defendan menuntut balas untuk gantirugi, gantirugi khas serta perintah-perintah deklaratori berikut, iaitu: pertama, untuk perintah bahawa perjanjian pinjaman adalah salah dan tak sah; kedua, bahawa Perintah Pengecualian yang diberi kepada AEH adalah *ultra vires* kuasa Menteri yang memberikannya. Defendan-defendan juga memohon perintah-perintah konsekuental

berikut sekiranya mahkamah memutuskan dengan berpihak kepada mereka, iaitu: bahawa AEH tidak berhak menguatkuasakan perjanjian pinjaman; bahawa sebarang gerenti dan/atau indemniti yang diberi oleh TSB dan Low kepada AEH diisytiharkan tak sah; dan supaya AEH membekalkan satu akaun yang betul mengenai segala pembayaran yang diterima dari AM-EL. Guaman Sivil D5 didengar atas tiga isu, iaitu: (i) sama ada pinjaman yang diberi kepada AEH yang dirujuk di dalam penyata tuntutan telah dilangsaikan pada 24 April 1997; (ii) sama ada satu pinjaman baru tanpa apa-apa pengecualian sah oleh Menteri mula berkuatkuasa pada 25 April 1997; dan (iii) sama ada pengecualian yang diberikan oleh Menteri Perumahan dan Kerajaan Tempatan mengecualikan AEH dari peruntukan-peruntukan Akta sah. Hakim Mahkamah Tinggi di sini membuat keputusan yang berpihak kepada AEH dan menolak tuntutan-tuntutan balas defendan-defendan.

Berikutnya, situasi yang wujud di mahkamah ini di permulaan pendengaran kedua-dua rayuan adalah, berkaitan dengan satu perjanjian pinjaman yang melibatkan pihak-pihak, fakta-fakta dan isu-isu yang sama, dua mahkamah berbidangkuasa setanding telah menyampaikan keputusan-keputusan yang bercanggah antara satu sama lain. Di dalam Guaman Sivil D5, AEH telah memperoleh penghakiman terhadap AM-EL, TSB dan Low – ekoran mana AEH dibolehkan melaksanakan 'execution' terhadap aset-aset mereka – namun telah dihalang pula oleh perintah mahkamah di dalam OS D2 dari merealisasikan hartanah yang digadaikan kepadanya oleh AM-EL sebagai sandaran bagi pinjaman yang diberi. Berhubung dengan AM-EL, ia berjaya mempertahankan OS D2 dan menghalang AEH dari menghalang tebus hartanah yang digadaikan olehnya kepada AEH sebagai sandaran pinjaman yang diambil, tetapi terpaksa berdepan pula dengan penghakiman yang dimasukkan terhadapnya di dalam Guaman Sivil D5.

Diputuskan (membenarkan Rayuan OS dan menolak Rayuan Guaman Sivil)

Oleh Zaleha Zahari HMR menyampaikan penghakiman majoriti mahkamah:

(1) Amat jelas dari lesen-lesen yang dikeluarkan bahawa AEH memiliki lesen memberipinjam wang di bawah s. 5 Akta. Juga jelas dari Gazet No. PU(B) 242/1996 bahawa satu Perintah Pengecualian di bawah s. 2A(2) Akta telah dikeluarkan kepada AEH oleh Menteri Perumahan dan Kerajaan Tempatan pada

15 Mei 1996 berdasarkan mana AEH telah dikecualikan dari peruntukan-peruntukan Akta antara lain berhubung "pajakan kredit/pembiayaan saham" untuk tempoh tiga tahun bermula 9 Mac 1996, pengecualian mana kemudiannya dilanjutkan untuk tempoh tiga tahun lagi bermula 9 Mac 1998 atas terma-terma yang sama. Dalam halkeadaan ini, AEH pada semua waktu material adalah pemberipinjam wang berlesen dan ekoran dari pengecualian yang diberikan, aktiviti-aktiviti pinjaman wang yang dimasukki oleh AEH yang berkaitan dengan pajakan kredit dan pembiayaan saham adalah dikecualikan dari peruntukan-peruntukan Akta, tertakluk kepada syarat-syarat yang tertera di perenggan (b) Perintah Pengecualian. Selain itu, Menteri yang diberi kuasa untuk memberikan pengecualian di bawah s. 2A(2) Akta adalah Menteri Perumahan dan Kerajaan Tempatan, bukannya Menteri Kewangan seperti yang dihujahkan oleh perayu-perayu di dalam Rayuan Guaman Sivil dan responden-responden di dalam Rayuan OS. Perintah Pengecualian PU(B) 242/96 adalah sah dan mempunyai kesan undang-undang penuh. Berdasarkan Perintah Pengecualian ini, berkaitan mana-mana pinjaman yang diberikan kepada AM-EL yang menyangkuti pajakan kredit/ pembiayaan saham AEH berhak mengenakan terma-terma dan syarat-syarat yang tidak konsisten dengan peruntukan-peruntukan Akta.

(2) Rekod menunjukkan bahawa sekeping cek untuk RM4,000,000 telah dikeluarkan oleh satu Hendersons (Malaysia) Sdn Bhd ('Hendersons') pada 24 April 1997 di mana AEH dinamakan sebagai penerimanya. Cek ini tidak boleh dilihat secara yang terasing tetapi harus ditafsir secara bersama dengan dokumen-dokumen kontemporari yang dibuat oleh pihak-pihak. Di atas fakta, adalah jelas bahawa, ekoran dari penerimaan surat ingatan AEH bertarikh 17 April 1997 kepada AM-EL berkaitan pinjaman RM4,000,000 yang sudah tertunggak dan perlu dilangsaikan pada 25 April 1997, AM-EL melalui surat bertarikh 23 April 1997 telah menyatakan niatnya untuk membayar balik hanya RM1,500,000 terhadap pinjaman tersebut sekaligus meminta satu lanjutan masa selama enam bulan dari 30 April 1998 untuk membayar bakinya sebanyak RM2,500,000. Permintaan ini diluluskan oleh AEH atas terma-terma pada 24 April 1997 dan kemudian diterima oleh AM-EL serta penggerenti-penggerenti. Fakta yang tidak dipertikai adalah tarikh kelulusan lanjutan masa untuk membayar

RM2,500,000 adalah tarikh yang sama penerimaan cek Henderson untuk membayar jumlah terhutang pada pinjaman AM-EL, ekoran mana AEH telah mengeluarkan resit rasmi bertarikh 24 April 1997. Mengambilkira semua ini, jumlah RM2,242,876.71 yang dibayar kepada AM-EL jelas berpunca dari lanjutan masa untuk membayar RM2,500,000 atas terma-terma yang dipersetujui. Apa yang terserlah adalah, oleh kerana masa untuk membayar RM2,500,000 telah dilanjutkan, jumlah ini serta jumlah yang mewakili terma-terma dipersetujui telah diambilkira, dan begitu juga dengan RM4,000,000 dari cek yang dikeluarkan oleh Hendersons. Mengambilkira rentetan peristiwa-peristiwa yang berlaku, dan berlaku secara serentak, wujud kesinambungan pada perjanjian pinjaman bertarikh 4 Jun 1996. Jumlah RM2,242,876.71 yang dikredit ke bank oleh AM-EL dan ditolak dari akaun AEH bukan satu pinjaman lain yang baru.

(3) Tiada keterangan bahawa AEH adalah *pari delicto* dan bahawa mereka mempunyai pengetahuan sewaktu memeberi pinjaman bahawa AM-EL berniat untuk membeli saham-saham Mahabudi atau pun tidak. Jika AM-EL tidak membeli saham-saham walaupun ia berkata akan membelinya, mahkamah ini tidak seharusnya dan tidak akan menghulurkan apa-apa bantuan bagi membolehkan AM-EL mengambil manfaat atas kemungkirannya sendiri, iaitu dengan bergantung kepada kemungkirannya tersebut bagi mengelakkan obligasinya untuk membayar balik di bawah perjanjian pinjaman. Menjadi tanggungjawab AM-EL untuk mempastikan bahawa pinjaman berkala yang dipohon, dan yang diberi oleh AEH, telah sebenarnya digunakan untuk membeli saham-saham Mahabudi. Berdasarkan fakta kes, terdapat keterangan yang mencukupi bahawa pinjaman yang diberikan kepada AM-EL oleh AEH adalah berkaitan dengan transaksi pembiayaan saham, dan bahawa AEH tidak melanggari syarat yang dikenakan oleh Menteri dalam Perintah Pengecualian apabila meluluskan pinjaman kepada AM-EL. Oleh yang demikian, AM-EL adalah diestop dari menyangkal bahawa pinjaman adalah diberi bagi membiayai pembelian saham-saham dalam Mahabudi sepertimana yang tercermin dari perjanjian pinjaman, pekeliling resolusi pengarah dan dokumen-dokumen kontemporari yang dimeterai. Maka prinsip undang-undang *ex turpi causa* adalah

terpakai; AM-EL tidak boleh mengambil manfaat dari kesalahannya sendiri. AM-EL terikat secara kontrak dengan terma-terma di dalam perjanjian pinjaman untuk membayar faedah yang dipersetujui. Di bawah pengecualian, AEH tidak melakukan apa-apa kemungkiran dalam mengenakan syarat dan terma yang menyanggahi s. 22 Akta. AM-EL bertanggungan untuk membayar jumlah yang dituntut.

(4) Penggerenti-penggerenti, di bawah gerenti dan indemniti, telah berjanji secara bersesama dan berasingan bahawa mereka, selaku peminjam utama dan bukannya sebagai penjamin, bersetuju untuk membayar, atas tuntutan, keseluruhan jumlah yang tertera di dalam perjanjian pinjaman atau mana-mana amaun yang tertunggak beserta dengan semua faedah, kos serta caj yang kena dibayar di bawah perjanjian pinjaman. Gerenti adalah sah dan boleh dikuatkuasakan. Penyata oleh seorang pegawai AEH berkenaan wang dan liabiliti-liabiliti yang kini tertanggung atau kena dibayar oleh peminjam kepada AEH adalah bukti konklusif dalam mana-mana prosiding undang-undang terhadap penggerenti-penggerenti (fasal 3(u)). AEH berhak untuk mendapat kembali dari penggerenti-penggerenti kesemua jumlah yang kena dibayar kepada AEH tanpa perlu terlebih dahulu menggunakan remedi undang-undang lain yang terhak kepadanya terhadap peminjam dan/atau mana-mana penjamin lain dan/atau mana-mana sandaran yang dipegang oleh AEH terhadap peminjam atau mana-mana orang lain. Mengambilkira dapatan mahkamah bahawa AM-EL telah berhutang kepada AEH bagi jumlah yang dituntut, penggerenti-penggerenti juga bertanggungan untuk membayar jumlah tersebut.

(5) Sebagai penutup, hakim Mahkamah Tinggi khilaf dalam menolak OS D2. Hal-hal yang dibangkitkan oleh AM-EL bukan 'cause to the contrary'. Hakim Mahkamah Tinggi di dalam Guaman Sivil D5 sebaliknya betul dalam membenarkan tuntutan AEH dan menolak tuntutan balas AM-EL.

Oleh Abdul Malik Ishak HMR (menentang):

(1) Tidak wujud kelakuan tidak berhati budi di pihak plaintif dan begitu juga tidak wujud sebarang pengaruh tidak wajar yang ditimbulkan olehnya. Perjanjian pinjaman bukan sesuatu yang menekan, tidak berhati budi atau tidak sah. Pinjaman, bagi

maksud pembelian saham-saham Mahabudi, dibuat secara sah dan dengan itu boleh dikuatkuasakan. Kadar faedah telah dipersetujui oleh defendan pertama (AM-EL) dan dengan itu bukan sesuatu yang melampau batas. Pihak-pihak juga bersetuju dengan fee untuk khidmat nasihat.

(2) Pengecualian Menteri yang diberikan kepada plaintif luput pada 8 Mac 1998. Dan jika hujah defendan-defendan pertama dan ketiga mengenai wujudnya dua pinjaman diterima, kedua-dua pinjaman ini secara teknikalnya masih lagi dirangkumi oleh pengecualian Menteri. Di atas fakta, Hendersons, pada 24 April 1997, telah membayar RM4 juta kepada plaintif untuk bayaran balik pinjaman sebanyak RM4 juta. Ini bermakna bahawa defendan pertama telah terlebih bayar kepada plaintif sebanyak RM1.5 juta berhubung pinjaman pertama, jumlah mana adalah lebih dari mencukupi untuk menampung apa jua faedah yang dikenakan oleh plaintif. Dan oleh kerana pinjaman pertama telah dibayar sepenuhnya, maka tiada keperluan untuk menghalang tebus kesemua 47 unit kondominium melalui penjualan lelong. Berkaitan pinjaman kedua yang berjumlah RM2,242,876.71, yang dibayar kepada defendan pertama oleh plaintif melalui cek bertarikh 25 April 1997, ianya tidak disokong oleh mana-mana perjanjian pinjaman. Baucer pembayaran bagi membayar jumlah RM2,242,876.71 tersebut menyatakan bahawa ia adalah pengeluaran pinjaman berkala. Tetapi pinjaman berkala untuk jumlah RM4 juta telahpun dikeluarkan pada 5 Jun 1996 dan tiada apa-apa lagi yang boleh dikeluarkan selepas itu. Keterangan menunjukkan cek sebanyak RM2,242,876.71 ini telah dibayar pada 30 April 1997. Tiada keterangan bahawa pinjaman kedua adalah untuk pajakan kredit ataupun pembiayaan saham. Setakat yang berkaitan dengan pinjaman kedua, ia adalah tak sah dan tidak boleh dikuatkuasakan. Bagaimanapun, pinjaman pertama nyata mempunyai ciri-ciri kesahan. Atas perkiraan, jika RM1.5 juta dipotong dari jumlah RM2,242,876.71, ia masih berbaki RM742,876.71 dan jumlah inilah yang telah dibayar oleh plaintif kepada defendan pertama di atas dasar *ex gratia*. Jumlah RM742,876.71 harus ditafsir selaras dengan tempat ia jatuh. Pembayaran balik RM1.5 juta dan RM4 juta kepada plaintif tidak boleh disapu ke bawah karpet dengan begitu sahaja. Pembayaran-pembayaran balik sedemikian harus ditafsirkan dalam perspektifnya yang betul dan apabila ditafsirkan

sedemikian, akibatnya menunjukkan bahawa pinjaman RM4 juta telah dibayar balik sepenuhnya kepada plaintif. A

(3) Atas alasan-alasan di atas, rayuan plaintif berkaitan prosiding halang tebus di dalam OS D2 harus ditolak. Berkaitan Guaman Sivil D5, rayuan seharusnya dibenarkan. Oleh itu, tuntutan-tuntutan balas defendan-defendan pertama dan ketiga harus ditolak kerana mereka telah berjaya dalam hujah-hujah mereka berkaitan pinjaman kedua. B

Case(s) referred to: C

A Schroeder Music Publishing Co v. Macaulay [1974] 1 WLR 1308 ***(refd)***
Ahmad Udoh & Anor v. Ng Aik Chong [1970] 1 MLJ 82 ***(refd)***
Alec Lobb (Garages) Ltd v. Total Oil (Great Britian) Ltd [1985] 1 WLR 173 ***(refd)***
Ang Khye Pang v. Chop Ban Aik [1939] MLJ 282 ***(refd)***
Ashmore, Benson, Pease & Co Ltd v. AV Dawson Ltd [1973] 1 WLR 828 ***(refd)*** D
Bumiputra Merchant Banker Berhad v. The Melewar Corporation Bhd & Ors [1990] 2 CLJ 30; [1990] 1 CLJ (Rep) 693 HC ***(refd)***
Bridge v. Campbell Discount Co Ltd [1962] AC 600 ***(refd)***
Campbell v. Mc Isaac [1873] 9 NSR 287 ***(refd)***
Chai Sau Yin v. Liew Kwee Sam [1962] MLJ 152 ***(refd)*** E
Clipper Maritime Ltd v. Shirlstar Container Transport Ltd [1987] 1 Lloyd's Rep 546 ***(refd)***
Coady v. J Lewis & Sons Ltd [1951] 3 DLR 845 ***(refd)***
Coles v. Pack [1869] LR 5 CP 65 ***(refd)***
Credit Lyonnais Bank Nederland NV v. Burch [1997] 4 All ER 144 ***(refd)*** F
Co-operative Central Bank Limited, The v. Feyen Development Sdn Bhd [1995] 1 AMR 2751 ***(refd)***
Crown Lumber Co Ltd v. Engel [1961] 28 DLR (2d) 762 ***(refd)***
Davys v. Buswell [1913] 2 KB 47 ***(refd)***
F Xavier v. Kathamuthu Konar [1958] MLJ 286 ***(refd)***
Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors [1991] 1 CLJ 522; [1991] 2 CLJ (Rep) 614 HC ***(refd)*** G
Goulston Discount Ltd v. Clark [1967] 2 QB 493 ***(refd)***
Harburg India Rubber Comb Co v. Martin [1902] 1 KB 778 ***(refd)***
Heald v. O' Connor [1971] 1 WLR 497 ***(refd)***
Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC ***(refd)*** H
Hughes v. Kingston upon Hull CC [1999] 2 All ER 49 ***(refd)***
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(refd)***
Kandiah Peter Kandiah v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***
Kartar Singh v. Mahinder Singh [1959] MLJ 248 ***(refd)***
Levy v. Yates [1838] 8 A & E 129 ***(refd)*** I

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Lloyds Bank Ltd v. Bundy [1975] QB 326 ***(refd)***
Mahamed v. Alaga & Co [1998] 2 All ER 720 ***(refd)***
Mallett v. Bateman [1865] LR 1 CP 163 ***(refd)***
Mathura Das v. Secretary of State AIR [1930] All 848 ***(refd)***
Multiservice Bookbinding Ltd v. Marden [1979] Ch 84 ***(refd)***
Nandlal Chananbax v. Firm Kishin Chand AIR [1937] Sindh 50 ***(refd)***
Nicholson v. Paget [1832] 1 Cr & M 48 ***(refd)***
Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1980] 2 MLJ 9 ***(refd)***
Overseas Union Finance Ltd v. Lim Joo Chong [1971] 2 MLJ 124 ***(refd)***
Pancaran Nilam (M) Sdn Bhd v. Malayan Banking Bhd [2000] 4 CLJ 793 CA ***(refd)***
Photo Productions Ltd v. Securicor Transport Ltd [1980] AC 827 ***(refd)***
PJ Rajappa v. Associated Industries Pvt Ltd Quilon, 1 [1990] SC 162 ***(refd)***
R v. Gurofsky [1919] 16 OWN 19 ***(refd)***
Royal Bank of Scotland v. Etridge (No 2) [2001] 3 WLR 1021 ***(refd)***
Samuel v. Newbold [1906] AC 461 ***(refd)***
Scott v. Brown [1892] 2 QB 724 ***(refd)***
Shiloh Spinners Ltd v. Harding [1973] AC 691 ***(refd)***
Standard Chartered v. Walker [1982] 3 All ER 938 ***(refd)***
Standard Chartered Bank Australia Ltd v. Greater Pacific Investments Ltd [1991] 5 WAR 541 ***(refd)***
The Co-operative Central Bank Ltd v. Realvest Properties Sdn Bhd [1992] 3 CLJ 1485; [1992] 2 CLJ (Rep) 300 HC ***(refd)***
Total Oil Products (Aust) Pty Ltd v. Robinson [1970] 1 NSWR 701 ***(refd)***
Turner Manufacturing Co Pty Ltd v. Senes [1964] NSWR 692 ***(refd)***
Teja Singh v. K Periasamy [1958] 24 MLJ 81 ***(refd)***
Western Credit Ltd v. Alberrry [1964] 2 All ER 938 ***(refd)***
Waugh v. Morris [1873] LR 8 QB 202 ***(refd)***
Yeep Mooi v. Chu Chin Chua & Ors [1981] 1 MLJ 14 ***(refd)***
Yeoman Credit Ltd v. Latter [1961] 1 WLR 828 ***(refd)***
Yeoh Hooi Ing (as personal representative of the Estate of Tan Teong Soon, deceased) v. Cheung Kong Hotel Sdn Bhd [1997] 1 AMR 744 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Ministerial Functions Act 1969, s. 2
Moneylenders Act 1951, ss. 2, 2A(2), 5(1), 22
Rules of the High Court 1980, O. 79 r. 3

For the appellants - SK Sivam; M/s PG Lim & Co
For the respondent - Terrance Simon Marbeck (Cheng Poh Heng with him); M/s TS Marbeck & Co

[Appeals from High Court, Kuala Lumpur; Civil Suit No: D5-22-363-2000 & Originating Summons No: S2-24-2274-1999]

Reported Suresh Nathan

JUDGMENT

Zaleha Zahari JCA:

[1] Appeal No. W-02-665-04 and Appeal No. W-02-619-00 were heard jointly.

[2] For convenience of reference, in this judgment, Kuala Lumpur High Court Civil Suit No. D5-22-363-2000 will be referred to as "the D5 Civil Suit" and appeal therefrom (Appeal No. W-02-619-00) as "the Civil Suit appeal". As for Kuala Lumpur High Court Originating Summons No. S2-24-2274-99, this will be referred to the "D2 OS" and appeal therefrom (Appeal No. W-02-619-00) as "the OS appeal".

[3] Parties will be referred to as follows: AEH Capital Sdn. Bhd., the plaintiff in the High Court in respect of both proceedings (the D5 Civil Suit and the D2 OS), will be referred to as "AEH"; AM-EL Holdings Sdn. Bhd., the 1st defendant in the D5 Civil suit and defendant in the D2 OS will be referred to as "AM-EL"; Tempamas Sdn. Bhd., the 2nd defendant in the D5 Civil Suit as "TSB; and Low Koon Chuan the 3rd defendant in the D5 Civil Suit will be referred to as "Low" or as "Guarantors" jointly.

[4] Unless expressly stated, reference to any legal provision refers to the Moneylenders Act 1951 ("the Act").

Kuala Lumpur High Court Originating Summons No. S2-24-2274-99

[5] *Vide* the D2 OS, AEH applied for orders for sale of 47 condominium units which had been charged to them by AM-EL. Particulars of the loan account of AM-EL and the amount outstanding was particularized in para 15 of the affidavit of Chitra Ganesalingam affirmed on 2 June 2000 and filed in support of the application.

[6] In opposing the D2 OS, AM-EL alleged that the loan agreement dated 4 June 1996 was not in compliance with the Act and contended that the loan transaction was "unlawful, unconscionable, inequitable, invalid unjust" and should be set aside. AM-EL further alleged that AEH had failed to disclose all documentation in connection with the loan, that the interest

imposed was "excessive and contrary to law", that the imposition of interest upon interest contravened s. 11 of the Civil Law Act 1950".

[7] AM-EL's case was that there was in existence an oral agreement by which agreement AEH had agreed to furnish a proper statement of account and to release 22 condominium units which had been charged to AEH upon payment of RM1,500,000 towards the loan. AM-EL further contended, although RM1,500,000 had been paid, AEH had failed to release the 22 condominium units which had orally been agreed upon. AM-EL averred to having suffered loss by reason of being deprived of the benefit of the sale of 22 condominium units arising from the alleged breach of the oral agreement.

[8] On the part of the guarantor, Low, in para 8(i) of the affidavit affirmed on 29 June 2000 in opposition to the application for the order for sale in the D2 OS, reference was made to the defence and counterclaim filed in the D5 Civil Suit, that the validity of the term loan taken from AEH had been challenged.

[9] The High Court judge on 10 August 2000 dismissed AEH's application for orders for sale of the condominium units which had been charged to them as security for the loan granted. The Exemption Order under 2A(2) of the Act accorded to AEH, was only applicable if the loan granted had been utilized in respect of a share financing transaction. As the Exemption Order under s. 2A(2) of the Act had been challenged, it was incumbent upon AEH to produce evidence to respond to that challenge. The onus lies upon AEH to hold out the relevant Share Purchase Agreement and the price of the shares. AEH's failure to annex documents to their affidavit showing that the loan was in respect of a share financing scheme to purchase the paid-up capital of Mahabudi Development Sdn. Bhd. ("Mahbudi") was held to be fatal. The Directors' Circular Resolution of AM-EL stating the purpose of the loan "to part finance the purchase of the fully issued and paid-up capital of Mahabudi" was held to be insufficient.

[10] AEH's appeal against this decision of the High Court dated 10 August 2000 is the subject matter of appeal in the OS appeal.

Kuala Lumpur High Court Civil Suit No. D5-22-363-2000

[11] By the D5 Civil Suit, AEH sought to recover the balance outstanding sum as at 15 December 1998 against AM-EL, TSB and Low. It is common ground the D5 Civil Suit is grounded on the same term loan as that in D2 OS, based on the same documentation, and practically the same facts.

[12] By amended statement of defence dated 9 October 2000 AEH was required to strictly prove that they were in possession of a valid moneylender's licence as well as an exemption under the Act. The defendants alleged that the loan transaction dated 4 June 1996 which the parties had entered into contravened the provisions of the Act. The terms of the loan were described as "harsh, unconscionable, unjust and wrongful", the interest rate of 24.73% levied as "excessive, wrongful and illegal". The requirement to pay an "Advisory Fee" was considered "a wrongful charge and an illegal benefit". The imposition of payment of interest at the inception of the loan was considered to be "payment for that which has not accrued", and accordingly, "wrongful and illegal". The defendants also alleged that the conditions precedent for the loan had not been complied by AEH. The loan was not for the purpose of purchase of shares in Mahabudi. It was also alleged that there was in existence an oral undertaking to release 22 of the condominium units which had been charged to AEH as security for the loan upon AM-EL paying RM1,500,000, and although payment of the said sum had been made, AEH was in breach of the oral undertaking.

[13] The guarantors in their defence contended that the guarantee and indemnity executed by them were void and of no effect for lack of consideration; alternatively, by reason of illegality. It was further contended, as the principal agreement had been altered by AEH, TSB and Low were released from liability as guarantors, and the guarantee and indemnity was unenforceable against them.

[14] AM-EL counter-claimed for damages, special damages amounting to RM131,197 as well as several declaratory orders: firstly, for an order that the loan agreement dated 4 June 1996 is wrongful, invalid and illegal in law; secondly, that the Exemption Order granted to AEH under s. 2A(2) of the Act was wrongful and *ultra vires* the powers of the Minister granting it. Should the

court rule in the defendants favour and grant the declaratory orders sought, the defendants then prayed for consequential orders in the following terms: that AEH is not entitled to enforce the loan agreement dated 4 May 1996; a further order that any guarantee and/or indemnity given by TSB and Low to AEH be declared void. An order was also sought for AEH to provide a true account of all payments received from AM-EL.

[15] The D5 Civil Suit proceeded on three issues: Whether the loan granted by AEH referred to in the statement of claim was settled on 24 April 1997? Whether a new loan without a valid exemption of the Minister operates with effect from 25 April 1997? Lastly, whether the exemption granted to AEH by the Minister of Housing and Local Government exempting AEH from the provisions of the Act was valid?

[16] The D5 Civil Suit was decided without calling witnesses but based on the written and oral submissions of both parties. On 21 June 2004 the High Court Judge entered judgment in favour of AEH and dismissed the defendants' counter-claim with costs. The defendants' appeal against this decision is the subject matter of the Civil Suit appeal. We do not have the benefit of the grounds of decision of the High Court Judge in arriving at the decision which he did.

[17] The situation before this court at the commencement of hearing of these two appeals were, in respect of one loan transaction, involving the same parties, and the same facts and practically identical issues, two courts of co-ordinate jurisdiction had delivered conflicting decisions. In the D5 Civil Suit, AEH had obtained judgment against AM-EL, TSB and Low, pursuant to which it was permissible for AEH to execute against assets belonging to them but however was precluded by the court order in the D2 OS from realizing properties which had been specifically charged to them by AM-EL as security for the loan granted.

[18] As for AM-EL, they had successfully defended the D2 OS and precluded AEH from foreclosing on the properties which had been charged by them to AEH as security for the loan which they had taken, but however is confronted by the judgment entered against them in the D5 Civil Suit.

[19] What transpired would now be set out in chronological sequence of events and the issues and the arguments will be dealt with and considered at the appropriate stage. A

[20] It is abundantly clear from the licenses issued that AEH was in possession of a money lending license under s. 5 of the Act. The Penolong Pendaftar Pemberipinjam Wang, Wilayah Persekutuan had issued such a license to Latec Credit Sdn Bhd (AEH's former name) for the period 1 July 1995 to 30 June 1996. Thereafter, a money lending license was issued to AEH under the same provision for the period 1 July 1996 to 30 June 1997, which licence was renewed annually in 1998, 1999, 2000 as well as 2001. The licence for the period 1 July 2000 to 30 June 2001 was issued by Pengarah Jabatan Perlesenan Dewan Bandaraya, Kuala Lumpur. B C

[21] It is also evident from Gazette No. P.U.(B) 242/1996 that an Exemption Order under s. 2A(2) of the Act had been issued to AEH by the Minister of Housing and Local Government on 15 May 1996 according to which AEH was exempted from the provisions of the Act in respect of, *inter alia,* "credit leasing/share financing" for a period of three years with effect 9 March 1996, which exemption was subsequently extended for another period of three years from 9 March 1998 upon the same terms. D E

[22] In this circumstance, AEH was at all material times a licensed moneylender, and pursuant to the Exemption Order issued, activities of moneylending entered into by AEH relating to credit leasing/share financing were exempted from the provisions of the Act subject of course to the conditions set out in para (b) of the Exemption Order. F

[23] It is appropriate for me to deal with the challenge to the validity of P.U.(B) 242/1996 now. G

Whether P.U. (B) 242/96 Gazetted On 15 June 1996 Valid?

[24] Encik Terrence Marbeck, counsel for the appellants in the civil suit appeal and respondents in the OS appeal, argument on this issue were these. He submitted that the Minister conferred with jurisdiction to exercise the power under s. 2A of the Act was the Minister of Finance and not the Minister of Housing and Local Government for the following reason. Reference was made to the Schedule to the Federal Government Order 1983 (P.U.(A) H I

A 202/83) made pursuant to the powers conferred by s. 2 of the Ministerial Functions Act 1969. According to the Schedule to P.U.(A) 202/83, the Minister charged with responsibility for "... External and domestic loans, banking and other financial intermediaries" was the Minister of Finance. The Minister of
B Housing and Local Government, was, inter alia, charged with the responsibility of "pawnbrokers, moneylenders and moneylending ..." Encik Terrence submitted based on the Schedule referred to, the Minister in charge of "External and domestic loans, banking and other financial intermediaries" was the Minister with jurisdiction to
C exercise the power under s. 2A of the Act, not the Minster conferred with jurisdiction to advise "pawnbrokers, moneylenders and moneylending". Exemption Order P.U (B) 242/86 was, according to him, invalid as it was exercised by a Minister who was not empowered to do so. He further submitted that the
D Exemption Order granted to AEH undermined Parliament's intention to regulate, control and license moneylenders and contrary to public interest. The Minister ought not to have granted the Exemption Order which he did.

E **[25]** My views on this issue are these. As to which Minister is empowered to exercise the powers under the Act, and s. 2A in particular, this must necessarily be construed by taking into consideration the definition then of the word "Minister" in s. 2 of the Act. Prior to the amendment made by the Moneylenders
F (Amendment) Act 2003 (Act A1193/2003 which came into force on 1 November 2003) the word "Minister" was defined as "the Minister charged with the responsibility for the control of moneylenders". By Act A1193/2003 the word "Minister" is now defined as "the Minister charged with the responsibility for Local
G Government". Thus, post 1 November 2003, there is no ambiguity, the powers under the Act comes under the jurisdiction of the Minister in charge of Local Government, not the Minister of Finance. The question here is whether the position pre 1 November 2003 was different?

H **[26]** In considering this point it is observed that PU(A) 202/83 referred to by Encik Terrence in support of his argument, was no longer in force on 15 May 1996 (ie, the date of the Exemption Order in issue) having been revoked by the Ministers of the
I Federal Government Order (No 2) Order 1983 [PU(A) 520/83] with effect from 2 June 1983.

[27] Be that as it may, even if one were for a moment to accept that the jurisdiction of the Minister of Finance and that of the Minister of Housing and Local Government on the material date, (15 May 1995) to be in *pari materia* with that in P.U.(A)202/83, I am of the view that the general words "External and domestic loans" should be given a reasonable and sensible application without derogating the special provision relating to "moneylenders and money lending" dealt with in the same order being conferred under the jurisdiction of a different Minister. This special provision must not be rendered of having no effect merely by the force of the general words without an express indication of an intention to do so. In my view, as to the meaning to be ascribed to the special words of, "pawnbrokers, moneylenders and moneylending", when read together with the definition of the word "Minister" in the Act, it must be construed to mean that the "Minister charged with responsibility for control of moneylenders and moneylending" is the Minister of Housing and Local Government and not the Minister of Finance who is conferred with the responsibility of external and domestic loans.

[28] To conclude on this point, the Minister empowered to grant the exemption under s. 2A(2) of the Act is the Minister of Housing and Local Government. The Exemption Order P.U. (B) 242/96 is valid and of full legal effect. By reason of the Exemption Order P.U. (B) 242/96 issued, in respect of any loan given to AM-EL which is related to credit leasing/share financing, AEH was entitled to impose terms and conditions inconsistent with the provisions of the Act.

[29] The arguments canvassed by Encik Terrence consequential upon this ruling of the court will be dealt with subsequently in this judgment.

The Loan

[30] In order to appreciate the other challenges and arguments, it is necessary to set out the development as to how the indebtedness of AM-EL to AEH arose.

[31] By letter dated 17 May 1996 AM-EL applied for a loan of RM4,000,000 from AEH for drawdown by 5 June 1996 for a term of nine months and offered as security the following: a 1st party assignment over 47 units of condominiums known as "Setapak Ria

A Condominium" ("the condominium units") held under Master Title Geran 465, Lot 1130, Mukim of Setapak, Negeri Wilayah Persekutuan, an irrevocable call/put option for AEH to purchase 30% of the issued and fully paid shares of Mahabudi for RM4,000,0000 which option would be effective upon occurrence
B of a default of the loan, as well as a Corporate Guarantee of TSB and a Personal Guarantee by Low.

[32] AEH approved AM-EL's application. By letter dated 24 May 1996 AEH offered AM-EL a term loan for the following purpose-
C "To part finance purchase of the fully issued and paid-up capital of Mahabudi," upon the terms and conditions set out in that letter. The drawdown was as applied for by AM-EL, in one lump sum on 5 June 1996. The loan was repayable as applied for by AM-EL, in one lump sum nine months from date of first
D drawdown (by March 1997). The interest rate was 24.73% per annum (amounting to RM748,000) which amount was to be paid upfront on the date of drawdown of the loan. An "Advisory Fee" at 4% flat amounting to RM160,000 was also imposed, which sum was to be paid upfront on the date of drawdown. AEH agreed to
E accept the securities offered by AM-EL as security for the loan. The offer letter expressly specified that the term loan was to be secured by a 1st party loan agreement for RM4,000,000 over the condominium units offered by AM-EL.

F **[33]** On this offer letter dated 24 May 1996 was an acknowledgement by AM-EL accepting the terms and conditions set by AEH. Thereafter, the directors of AM-EL passed a circular resolution dated 27 May 1996 for AM-EL to accept the term loan of RM4,000,000 granted by AEH "upon the terms and conditions set
G forth in their letter of offer, reference: AEHC4608/PL/DL/tja dated 24 May 1996" for the purpose of – "To part finance the purchase of the fully issued and paid–up capital of Mahabudi Development Sdn. Bhd." The resolution then set out the terms and conditions that had been agreed upon by the parties.

H **[34]** A loan agreement between AM-EL and AEH dated 4 June 1996 ("the loan agreement") was then executed. The purpose of the loan granted by AEH to AM-EL is set out in Section 1.01 of the loan agreement. It states as follows:

I

1.01 The loan

The Borrower has requested and the Lender has agreed to make available to the Borrower a term loan facility up to the maximum aggregate principal amount of Ringgit Malaysia Four Million (RM4,000,000.00) only (hereinafter referred to as "the Loan") upon the terms and subject to the conditions hereinafter contained **for the purpose of the Borrower's purchase of shares in a company known as Mahabudi Development Sdn. Bhd.** (emphasis added)

[35] The purpose of the loan stipulated in Section 3.02 was:

The Loan shall be used to **part finance the purchase of all the shares in Mahabudi.** (emphasis added)

[36] Besides the loan agreement the following documents were also executed on 4 June 1996. TSB and Low each executed a guarantee and indemnity dated 4 June 1996 according to which TSB and Low unconditionally, jointly and severally agreed and undertook, that they would as principal debtor and not merely as surety, upon demand, repay in full all sums under the loan agreement or such amount as may be outstanding together with all interest, costs and charges due and payable under the loan agreement. The material clauses of the guarantee applicable to this case are cls. 3(s) and 3(u). Clause 3(s) of the guarantee states that a statement by an officer of AEH as to the monies and liabilities for the time being due or incurred from or by the Borrower (ie, AM-EL) to AEH shall be conclusive evidence in any legal proceedings against the guarantors. Clause 3(u) provides that AEH shall be entitled to recover from the Guarantors all sums payable to AEH without first availing of AEH's legal remedies against the borrower and/ or any other surety and/or any security AEH has or at any time thereafter have against the borrower or any other persons.

[37] A deed of assignment was also executed by AM-EL (as assignor) on 4 June 1996, in favour of AEH (as assignee). Recital (3) of the deed of assignment makes reference to AEH's letter of offer dated 24 May 1996 and loan agreement dated 4 June 1996 and then states, "the assignee agreed to grant and the assignor agreed to accept a term loan facility of up to Ringgit Malaysia Four Million (RM4,000,000) only ... upon the terms and conditions set out in the letter of offer and loan agreement."

[38] AM-EL issued a drawdown notice on the same date (4 June 1996), stating that they wanted to drawdown the approved loan on 5 June 1996, and then gave the required confirmations.

[39] Just before the due date for payment of March 1997, AEH by letter dated 26 February 1997, with reference to AM-EL's request for a month's extension to repay the loan, AEH was agreeable to grant the extension requested commencing 5 March 1997 and expiring on 5 April 1997 upon the terms specified in that letter. Paragraph (e) of this letter expressly states that all securities provided to AEH and all of AEH's rights for the above loan "shall be continuing". This letter dated 26 February 1997 bears an acknowledgement of acceptance of the terms of the extension set by AEH. AM-EL's response by letter dated 4 March 1997 was to make the payment of RM48,000 in settlement of the upfront interest (RM40,000) specified in para (b) and renewal fee of RM8,000 specified in para (c) of AEH's letter dated 26 February 1997.

[40] The record shows that AEH acceded to another request for extension by AM-EL to repay the loan, (ie, up to 25 April 1997) *vide* letter dated 2 April 1997. According to this letter the period for repayment was extended from 5 April 1997 to 25 April 1997 upon expiration of which the loan must be settled in full upon the terms set out in the said letter. Paragraph (e) of this letter states that all securities provided to AEH and all of AEH's rights for the loan shall be continuing. On this letter dated 2 April 1997 was an acknowledgement of acceptance by AM-EL.

[41] On 17 April 1997 AEH issued a letter to AM-EL reminding them that the term loan was due for settlement on 25 April 1997 and the sum of RM4,000,000 was to be paid on or before 12 noon on 25 April 1997. AM-EL's response to this letter was in terms of letter dated 23 April 1997. The letter is set it out in full as it has a bearing on the other issues which will be dealt with later on in this judgment. It reads as follows:

> Re: Term Loan of RM 4 Million due to AEH Capital Sdn. Bhd. on April 25, 1997. Request for extension of RM 2.5 Million for the period April 25, 1997 to October 31, 1997 and the option to extend a further 6 months ending 31 April 1997.

We refer to the above and wish to repay only RM1.5 million (Ringgit One million Five Hundred Thousand Only) of the abovementioned term loan facility of RM 4 Million (Ringgit Four Million).

We hereby request for further extension to repay the outstanding balance of RM2.5 million (Ringgit Two Million Five Hundred Thousand Only) for the period April 25, 1997 to October 31, 1997 of six months (i.e. to 30 April 1998). We would also appreciate if you could consider to grant us another extension of six (6) months upon the expiry on October 31, 1997 to extend to April 30, 1998.

The Guarantors, Mr. Michael Low Koon Chuan and Tempamas Sdn Bhd have been advised on the extension and they were agreeable to extend their commitment on it.

Your approval on the abovementioned request will be much appreciated.

Yours faithfully

Sgd
Michael Low Koon Chuan.

[42] AEH responded to this request for extension the following day, in terms of letter dated 24 April 1997. AEH were agreeable to extend the period for repayment of RM2,500,000 for a period of six months commencing on 25 April 1997 and expiring on 31 October 1997 "subject to the terms and conditions set out in our letter dated 24 May 1996 and subsequent letter dated 24 May 1996 and all security taken thereunder shall remain applicable" with certain specified exceptions and conditions. The letter further states that the loan may be extended for a further six months without any extension fee, ie, expiring on 30 April 1998, at AEH's sole discretion. The interest payable for this extended period was 16% per annum (ie, 189 calendar days) amounting to RM207,123.29 to be paid upfront. This interest was computed on the daily outstanding balance of the loan and charged upfront. A non-refundable extension fee of 2% flat amounting to RM50,000 was also to be paid upfront. The guarantors were required to agree and acknowledge the extension of payment and all terms and conditions and all incidental security documentation pertaining to the loan. In respect of existing securities, AEH's position was:

All securities provided to us and all our rights under the above Loan shall be continuing except for the following, which under this extension we are prepared to waive.

1) The Call Option (expiring May 5, 1997) granted to AEHC to purchase 30% of the equity interest of Mahabudi Development Sdn. Bhd. for RM 4 million for a tenure of 10 months.

2) The Grant of First Right of Refusal to AEHC to acquire Mahabudi Development Sdn. Bhd. in the event they decide to dispose Mahabudi to another listed company.

[43] The last paragraph of letter dated 24 April 1997 further required, if the conditions were acceptable to AM-EL, for their authorized signatory(s) to signify acceptance by signing and returning the duplicate copy of the letter on or before 25 April 1997 together with all relevant resolutions from AM-EL and Tempamas Sdn. Bhd. (the corporate guarantor) sanctioning the acceptance of the terms and conditions set out, failing which the offer would lapse. On this letter dated 24 April 1997 is an acknowledgment of acceptance by AM-EL as well as both of the guarantors that they had no objection to the terms and conditions set out in that letter.

[44] This is an appropriate stage to deal with the issue and arguments whether there was a continuation of the term loan dated 4 June 1996 as contended by AEH, or whether the loan was fully settled on 24 April 1997 and AM-EL was granted a second loan with effect from 25 April 1997 as alleged by AM-EL.

Whether There Was A Continuity Of The Term Loan Dated 4 June 1996?

[45] The record shows that a a cheque for RM4,000,000 was issued by Hendersons (Malaysia) Sdn. Bhd. (Hendersons) on 24 April 1997 where AEH was named as payee. On the same date, 24 April 1997, AEH issued an official receipt to Hendersons for RM4,000,000 being payment of "Principal outstanding on AM-EL Holdings Sdn. Bhd. Loan" in respect of cheque No. 060311.

[46] The following day, on the due date of the loan, 25 April 1997, AEH issued a cheque for RM2,242,876.71 to AM-EL. From the banking slip produced, the cheque issued by Hendersons was banked in on the same day as the date cheque for

RM2,242,876.71 was issued to AM-EL (ie, 25 April 1997). AEH's statement of account as at 30 April 1997 shows that Hendersons cheque of RM4,000,000 was credited into AEH's account on 25 April 1997 itself, whilst the cheque No. 00138876 issued by AEH to AM-EL for RM2,242,876.71 was only debited from AEH's account on 30 April 1997. There is on record a supporting voucher of AEH's cheque dated 25 April 1997 bearing the date "29 April 1997" which date has been cancelled above which is written another, "25 April 1997".

[47] Encik Terrence argued, based on the sequence of events that had transpired, as full settlement had been effected upon the issuance of the cheque by Hendersons, the question of continuity of the term loan dated 4 June 1996 does not arise. He emphasized the fact that the sum of RM2,242,876.71 was debited from AEH's account only 30 April 1997. According to him, this lapse of five days must be construed to mean that a new and separate loan had been granted, ie, on 29 April 1997, by AEH to AM-EL.

[48] My views on this issue are these. I am of the view that Hendersons cheque dated 24 April 1997 for the sum of RM4,000,000 must not be considered in isolation but must be read against the backdrop of all of the contemporaneous documents issued by the parties and be read in context. The conduct of parties and the documents exchanged must be taken into account. It is clear to me that, consequential upon receipt of AEH's reminder letter dated 17 April 1997 to AM-EL of the loan of RM4,000,000 being due for settlement on 25 April 1997, AM-EL had *vide* letter dated 23 April 1997, expressed their intention to repay only RM1,500,000 towards the loan and an extension of time of six months from 30 April 1998 to repay the balance of RM2,500,000, which request was duly approved by AEH upon terms on 24 April 1997 and subsequently accepted by AM-EL and the guarantors. The undisputed fact is the approval of extension of time of six months to pay RM2,500,000 is the same date of receipt of Hendersons cheque towards the amount outstanding on AM-EL's loan, arising from which AEH duly issued an official receipt bearing the date, 24 April 1997.

[49] Taking into account this development, by reason of AM-EL being prepared to settle only RM1,500,00, and the remaining RM2,500,000 to be paid six months later, and AEH's approval of the extension upon terms and conditions, which had been accepted by AM-EL, the amount RM2,242,876.71 which was paid to AM-EL was clearly attributable to the extension of time to pay RM2,500,000.00 upon the agreed terms. It would thus appear as the time for the payment of RM2,500,000 had been extended, this amount as well as the amount representing the agreed terms had, on the facts of this case been taken into account, as well as the RM4,000,000 attributable to the cheque issued by Hendersons. Taking into consideration in the events that had transpired, somewhat simultaneously, I am of the view that there was a continuity of the loan agreement dated 4 June 1996. The sum of RM2,242,876.71 represented by cheque No. 00138876 dated 25 April 1997 which AM-EL duly banked in and debited from AEH's account, in my view, did not constitute a new and separate loan.

[50] I pause here to observe that, at this stage, April 1997, there is nothing in the correspondence exchanged, of AM-EL requesting for extension of time to repay RM2,500,000 and the crediting of RM1,500,00 towards the loan at this stage, was to secure the release of any of the condominium units which had been charged by them to AEH. The release of any of the 47 apartments which had been charged to AEH upon the payment of RM1,500,000 accordingly does not arise.

[51] I will now deal with the subsequent development in this case.

Subsequent Extensions To Pay Balance Of RM2,500,00

(i) Extension To 30 April 1998

[52] AM-EL made another request for extension of time for repayment of the balance of the loan of RM2,500,00 *vide* letter dated 23 September 1997, this time to 30 April 1998 a copy of which was also extended to the Tempamas. This letter states as follows:

Re: Term Loan of RM4 Million due to AEH Capital Sdn. Bhd. on April 25, 1997.

Request for extension of RM2.5 Million due on October 31, 1997 for the period October 31, 1997 to April 1998.

We hereby request for further extension of time to repay the outstanding balance of RM 2.5 Million (Ringgit Two Million Five Hundred Thousand Only) for the period October 31, 1997 to April 30, 1998.

The guarantors, Mr. Michael Low Koon Chuan and Tempamas Sdn. Bhd. have been advised on the extension and they are agreeable to extend their commitment to it.

Your approval on the abovementioned request will be much appreciated.

Yours Faithfully

Sgd

Michael Low Koon Chuan

Director

[53] AEH's reply to AM-EL was in terms of letter dated 25 September 1997, the material parts of which reads as follows:

we refer to your request for extension of time to pay RM2.5 Million (Ringgit Two Million Five Hundred Thousand Only) due to us on October 31, 1997 in your letter dated September 23, 1997.

We are pleased to advise that we are agreeable to extend the time for repayment of the RM 2.5 Million due to us subject to the *terms and conditions in our letter of offer dated May 24, 1996 and our subsequent letter dated April 24, 1997 and all security together with the terms and conditions taken thereunder shall remain applicable,* except for the following:

Tenure:

The extension is for a period of 6 months, commencing on October 31, 1997 and expiring on April 30.1998 (i.e. 181 calendar days).

Interest:

Interest of 16% per annum on the extension period (i.e. 181 calendar days) amounting to RM 198,356.16 (ringgit One Hundred And Ninety Eight Thousand, three Hundred Fifty Six and Sixteen Cents Only) shall be paid upfront to AEH Capital Sdn. Bhd. ("AEHC). This interest is computed on the daily outstanding balance of the loan and charged upfront.

If the above is acceptable to you kindly have your autrhorised signatory(s) signify your acceptance by signing and returning the duplicate copy of this letter to us on or before October 19, 1997 together with all the relevant resolutions from yourselves and Tempamas Sdn. Bhd. (the corporate guarantor) sanctioning the acceptance of this letter and the terms herein, failing which this offer shall lapse. (emphasis added)

[54] On this letter is an acknowledgement of acceptance by AM-EL of the terms as well as an acknowledgement by the guarantors that they have no objection to the terms and conditions set out in the said letter.

[55] AEH then by letter dated 27 October 1997 forwarded copies of the resolutions to be executed by AM-EL and Tempamas to be returned on or before 31 October 1997 and also requested for payment for the interest on the extension period amounting to RM198,356.16.

[56] By letter dated 31 October 1997, AM-EL duly forwarded to AEH a cheque for the sum of RM198,356.16 representing "our interest paid to you for the extension of our Loan of RM2.5 million for the period 1 November 1997 to 30 April 1998".

(ii) Extension To 31 July 1998

[57] *Vide* letter dated 27 April 1998 AM-EL made another request to AEH for extension of time to repay the outstanding balance of RM2,500,000 due on 30 April 1998 for the period 1 May 1998 to 31 October 1998. In this letter AM-EL also stated that the guarantors "have been advised on the extension and they are agreeable to extend their commitment on it."

[58] AEH's response was in terms of letter dated 30 April 1998. The 2nd paragraph of this letter states that AEH was agreeable to extend time for repayment of the RM2,500,000 due, not for the full period requested (ie, to 31 October 1998) but only for a

period of three months commencing 1 May 1998 and expiring on 31 July 1998 (ie, 93 calendar days) "subject to the terms and conditions in the letter of offer dated 24 May 1996, and letters dated 24 April 1997 and 27 September 1997 and all security together with the terms and conditions taken thereunder shall remain applicable" with certain exceptions. The interest imposed, 20% per annum on the extension period was RM126,028 which was charged and payable upfront to AEH. A non-refundable extension fee of 1% flat amounting to RM25,000 was also levied and payable upfront. There were again acknowledgement of acceptances from AM-EL and company resolution by AM-EL's Directors and the guarantors confirming that they have no objection to the extension of the loan on the terms and conditions specified in that letter.

[59] The statutory declaration by Low in his capacity as Director of AM-EL on 27 May 1998 states:

> I. LOW KOON CHUAN (NRIC NO: 420710-10-5351) of No. 1 Jalan SS 22A/4 Damansara Jaya, a Director of AM-EL Holdings Sdn. Bhd. (Company No. 203745M) (hereinafter referred to as the Company) a company incorporated n Malaysia and having its registered address at No. 90, Jalan Alor, 50200 Kuala Lumpur do solemnly and sincerely declare that:
>
> 1. I am fully authorized by the Company to make this declaration.
>
> 2. *By a loan agreement dated June 4, 1996 (hereinafter referred as "the Loan Agreement) entered into between the Company and AEH Capital Sdn. Bhd. (the Lender) the Lender granted the Company a loan of RM4,000,000.00 (the Loan);*
>
> 3. *The Company has made a partial repayment of RM1,500,000.00. The balance of the Loan of RM2,500,000.00 is payable by July 31, 1998 and the Company has applied for an extension of time to repay the balance of the Loan.*
>
> 4. In support of the application for the extension of the Loan, I hereby declare that since the date of the Loan Agreement:
>
> a) There has been no material change or circumstances in or affecting the Company or its subsidiaries and that the statements and information provided to the Lender in particular in the Loan Agreement and security documents were true and continue to be true in all material respects at the time of submission by the Company.

b) *All securities taken as security for the Loan Agreement including the assignment of 47 units of apartments at Setapak Ria held under Master Title Geran 465, Lot 1130, Mukim of Setapak, Wilayah Persekutuan are still intact;*

c) the Company's obligations under the Loan Agreement or any other document relating to the Loan continue to be valid, binding and enforceable in accordance with their terms." (emphasis added).

[60] I pause here again to observe, as at 27 May 1998, the question of releasing any of the 47 apartments which had been charged to AEH upon the payment of RM1,500,000 which had earlier been effected has not been raised by AM-EL. The referral back to the loan dated 4 June 1996, and all previous letters of the earlier extensions that had been granted again supports AEH's version, that there was a continuity of the loan dated 4 June 1996.

(iii) Further Request For Extension Of Time To Repay

[61] AM-EL made yet another request for extension to pay RM2,500,000 *vide* letter dated 20 July 1998. AEH's response to this request, *vide* letter dated 27 July 1998, wherein they stated:

Re: Term Loan RM 4 Million Further To Letter Of Offer dated May 24, 1996

Extension of time to pay RM1.5 Million to AM-EL Holdings Sdn. Bhd. ("AHSB")

We refer to your request for extension of time to pay RM2.5 (Ringgit Two Million Five Hundred Thousand only) due to us on July 31, 1998 in your letter dated July 20, 1998.

We regret to advise that we are only agreeable to extend the time for repayment of the RM 1,500,000.00 (Ringgit One Million Five Hundred Thousand Only) due to us subject to the terms and conditions in our letter of Offer dated May 24, 1996, April 24, 1997, September 25, 1997 and our subsequent letter dated April 30, 1998 and all security together with the terms and conditions taken thereunder shall remain applicable, except for the following:

Condition:
The sum of RM1,000,000.00 (Ringgit One Million Only) payable to AEH Capital Sdn. Bhd. in the form of a Bankers' Cheque to be received by us on or before 12.00 noon on July 31,1998.

Tenure:
The extension is for a period of 3 months, commencing on August 1, 1998 and expiring on October 31, 1998 (i.e. 92 calendar days).

Interest:
Interest of 20% per annum on the extension period (i.e. 92 calendar days) amounting to RM75,617.00 (Ringgit Seventy Five Thousand Six Hundred and Seventeen Only) shall be paid upfront to AEH Capital Sdn. Bhd. ("AEHC"). This interest is computed on the daily outstanding balance of the loan and charged upfront.

If this is acceptable to you, kindly have your authorised signatory(s) signify your acceptance by signing and returning the duplicate copy of this letter to us on or before July 30, 1998 together with all the relevant resolutions from yourselves and Tempamas Sdn. Bhd. (the corporate guarantor) sanctioning the acceptance of this letter and the terms and conditions herein, failing which this offer shall lapse. (emphasis added)

[62] AM-EL responded to AEH letter dated 27 July 1998 *vide* letter dated 7 August 1998. It states as follows:

I refer to your letter Ref : AEHC/2034-98/CGS/PUSC dated 27th July, 1998 and the subsequent meeting between your Mr. Chan Guan Seng and the undersigned on the above subject matter. In view of the good relationship that exist between ourselves, I have offered and you have agreed to the following:

(i) that the term loan of RM 4.0 million which has already been reduced to RM2.5 million be further reduced to RM1.5 million on or before 15th September 1998 by our agreeing to pay to you the sum of RM1.0 million in the form of a Banker's Cheque to be received by you not later than 12:00 noon on 15th September 1998.

(ii) that in consideration of our having reduced our term loan with you from RM4.0 million to RM2.5 million and now to reduce the said term loan to RM1.5 million by 15th September, 1998, you will release 22 units of Apartment from the original 47 units of apartments in the Setapak Ria Condominium, presently charged to you as collateral security.

(iii) other term and conditions as stated in your letter of 27th July, 1998 is acceptable to us.

(iv) that the units of Apartment in the Setapak Ria Condominium, to be released to us are as follows:

A (1) C-2-7
(2) C-2-8
(3) C-4-3
(4) C-4-4
B (5) C-6-3
(6) C-6-4
(7) C-15-7
(8) C-18-4
(9) C-22-6
C (10) C-23-1
(11) C-23-3
(12) C-24-2
(13) C-24-3
D (14) C-24-4
(15) D-1-1
(16) D-1-4
(17) D-6-3
(18) D-6-5
E (19) D-18-4
(20) D-20-1
(21) D-20-2
(22) D-20-3

F Meanwhile I shall in due course submit to you all the relevant resolutions from ourselves and M/s. Tempamas Sdn. Bhd. sanctioning our new arrangement, for your file and record purposes.

G **[63]** It is pertinent to note that it is only in this letter dated 7 August 1998 that AM-EL raised the issue of releasing some of the securities which had been charged to AEH for the loan. There is nothing on record to show that the terms proposed in AM-EL's letter dated 7 August 1998 was accepted by AEH. In fact, AEH
H strongly denied that having agreed to release any of the properties that had been charged to them as security for the loan. It would appear from the subsequent correspondence that AM-EL did not pay the RM1,000,000 by 15 September 1998 as stated in their letter dated 7 May 1998.

I

[64] On 21 September 1998 AEH issued a letter to AM-EL certifying that the facility of RM2,500,000 were due to be paid by 31 July 1998. Reference was made to AM-EL's letter dated 7 August 1998 and of AM-EL's failure to fulfill their offer to part settle the term loan by 15 September 1998. By reason thereof AEH states-

> … the Term Loan facility is now terminated and we demand for the payment of RM2,638,630.15 together with further interest and late charges at the respective rates, the particulars of which are as follows:
>
> Term Loan Facility
>
> | | |
> |---|---|
> | Principal Sum | RM2,500,000.00 |
> | Additional Interest @ 20% p.a. From 1/8/98 to 15/9/98 | RM 63,013.70 |
> | Late Charges @ 24% p.a. From 1/8/98 to 15/9/98 | RM 75,616.45 |
> | Total Sums due and owing as at 15/9/98 | RM2,638,630.15 |
>
> thereafter interest will be accruing at the rate of 20% per annum and late charges will be accruing at 4% over and above the prescribed rate until full payment.
>
> You are required to make the payment of the sum of RM2,638,630.15 together with further interest abovementioned within 14 days from the date hereof.

[65] When AM-EL continued to default in paying the sum demanded within the period specified, AEH through their solicitor's letter dated 3 February 1999, demanded payment of the sum of RM2,687,630.15 (the sum due and owing as at 15 December 1998) together with further interest and late charges within 14 days from the date of the letter. Notices of demand were also issued to the guarantors, both dated 25 February 1999, one to TSB, and the other, to Low, demanding payment of the amount outstanding as at 15 December 1998 together with all applicable interests within seven days of the date of the said letter.

[66] AEH's solicitors then by letter dated 22 October 1999 terminated AM-EL's licence to occupy the condominium units and claimed vacant possession thereof within seven days from date of the letter. When AM-EL failed to pay the amount demanded, or any part thereof, within the period specified, AEH also invoked the right conferred upon them by s. 4(e) of the deed of assignment dated 4 June 1996, ie, the right, upon breach, to sell the condominium units in order to settle the amount outstanding under the loan.

[67] On 19 November 1999 AEH filed the D2 OS against AM-EL, and on 28 February 2000, filed the D5 Civil Suit against AM-EL, TSB and Low.

Whether Onus On AEH To Produce Evidence On Share Financing?

[68] The High Court Judge in the D2 OS was persuaded by the argument that it was necessary for AEH to produce the material/evidence that the loan had in fact been utilized for share financing. According to Encik Terrence production of the loan documentation stating that it was for the purpose of purchasing "Mahabudi" shares was insufficient, that it was but a "sham device" to enable AEH to impose an unconscionable interest rate, as well as to circumvent the provisions of the Act. He submitted that AEH knew or ought to have known that the loan to AM-EL was not for the purpose of purchase of "Mahabudi" shares. He drew the court's attention that AEH had, on 24 March 1997, granted a loan of RM35,000,000 to one Shardin Bin Mohd Arshad to acquire the entire issued and paid-up capital of Mahabudi. No money lender would grant a loan to purchase shares without ascertaining the purchase price and value of the shares, the business of the company and its financial position. He submitted the court ought not to lend its assistance to enforce an illegality.

[69] It is pertinent to bear in mind the fact that the Minister of Housing and Local Government was not a party to both of the proceedings before the High Court. I am of the view that, in both proceedings, the D2 OS as well as in the D5 Civil Suit, it was not necessary for AEH to produce the material presented before the Minister of Housing and Local Government in respect of the application for exemption under s. 2A(2) of the Act, as to its duration and the limitations, restrictions or conditions that should be imposed as contended by AEH.

[70] In foreclosure proceedings (such as the D2 OS), it sufficed for the chargee to hold out the documentation giving rise to their right to exercise their statutory power of sale which on the facts of this case had duly been complied with. The chargor is required to show cause to the contrary. The burden was therefore on AM-EL to show cause to the contrary in respect of the D2 OS. As for a civil suit, it was incumbent upon the AEH to produce the documentation giving rise to the alleged indebtedness.

[71] On the issue whether the loan granted falls within the Exemption Order granted to AEH, the evidence produced clearly established that AM-EL had in their application for the loan from AEH in unequivocal terms stated that it was for the purpose of purchasing Mahabudi shares. The loan approved by AEH upon terms was for the purpose applied for, to enable AM-EL "To part finance purchase of the fully issued and paid up capital of Mahabudi Development Sdn. Bhd." AM-EL had signed at the bottom of the letter of offer an acknowledgement of acceptance of the terms. AM-EL had furnished the required Directors circular resolution showing that AM-EL's Board had approved the borrowing of RM4,000,000 from AEH, for the purpose stated, "to part finance the fully issued and paid up capital of Mahabudi".

[72] By letter dated 27 May 1996, from Low (as director of AM-EL) agreed for AM-EL to complete the purchase of Mahabudi shares and agreeing to indemnify AEH for all losses in the event of non-completion. The loan agreement executed also made reference to the purchase of shares in Mahabudi. Likewise the option agreement dated 4 June 1996 executed between AEH and AM-EL, also refers to the purchase by AM-EL of Mahabudi shares. Even in the drawdown notice issued by AM-EL dated 4 June 1996 to AEH, para (e), AM-EL had confirmed compliance of the terms of the loan agreement. The statutory declaration dated 27 May 1998 of the 3rd defendant, Low (as Director of AM-EL) also confirmed that all statements and information provided to AEH, in particular in the loan agreement, were true and continue to be true, and AM-EL's obligations under the loan agreement or any other documents relating to the loan continue to be valid.

[73] There is no evidence that AEH was in *pari delicto* and that they had knowledge when they loaned the monies that AM-EL did or did not intend to purchase the Mahabudi shares. If AM-EL did

not purchase the Mahabudi shares as they said they would, I agree with the submission of Encik Sivam, counsel for the appellant in the D2 OS and respondent in the D5 Civil Suit, that this court should not and must not lend its aid to enable AM-EL to take advantage of their own default by relying on their own breach to avoid their obligations to escape payment under the loan agreement. I agree that it was AM-EL's responsibility to ensure that the term loan applied for, which had been granted by AEH, had in fact been utilized to purchase Mahabudi shares. On the facts of this case, there was sufficient evidence before the court that the loan granted to AM-EL by AEH was in respect of a share financing transaction, and AEH was not in breach of the condition imposed by the Minister in the Exemption Order in granting the loan which they did to AM-EL.

[74] In the circumstances of this case AM-EL is estopped from denying that the loan given was to finance the purchase of shares in Mahabudi as reflected in the loan agreement, Directors Circular Resolution and the contemporaneous documents executed. The legal principle *ex turpi causa* applies, AM-EL is not to benefit from their own wrongdoing.

[75] AM-EL were contractually bound by the terms in the loan agreement and pay the interest that had been agreed upon. Pursuant to the exemption AEH was not in breach in imposing terms and conditions contrary to s. 22 of the Act nor the imposition of Advisory Fees, and the requirement to pay the interest and Advisory Fees up front. AM-EL is liable to pay the amount claimed.

[76] The guarantors pursuant to the guarantee and indemnity had unconditionally jointly and severally agreed and undertook that they would as principal debtor and not merely as surety upon demand repay in full all sums under the loan agreement or such amount as may be outstanding together with all interest, costs and charges due and payable under the loan agreement. The guarantee is legal and enforceable. A statement by an officer of AEH as to the monies and liabilities for the time being due or incurred from the borrower to AEH shall be conclusive evidence in any legal proceedings against the guarantors (cl. 3(u). AEH is entitled to recover from the guarantors all sums payable to AEH without first availing of their legal remedies against the borrower and/ or any other surety and/or any security that AEH has or at

any time thereafter have against the Borrower or any other persons. In view of the courts finding that AM-EL is indebted to AEH in the amount claimed, the guarantors is also liable to pay in the amount claimed.

[77] To conclude, the High Court Judge erred in dismissing the D2 OS. The matters raised by AM-EL does not constitute cause to the contrary. The OS appeal is allowed with costs. The decision of the High Court Judge is set aside and there will be an order in terms of the application in the D2 OS. The deposit in the OS appeal to AEH to account of taxed costs.

[78] The High Court Judge in the D5 Civil Suit was right in allowing AEH's claim and in dismissing AM-EL's counter claim. The civil suit appeal is dismissed with costs. The High Court Judge's decision is affirmed. The deposit in the civil suit appeal to AEH to account of taxed costs.

[79] My brother, Justice Dato' Raus Sharif, has read this judgment in draft and has expressed his agreement with the contents therein.

Abdul Malik Ishak JCA:

Introduction

[80] These two appeals were heard together. The first appeal involved an Originating Summons No: S2-24-2274-1999 between AEH Capital Sdn Bhd as the plaintiff and AM-EL Holdings Sdn Bhd as the defendant. The first appeal pertained to the foreclosure proceedings as per the originating summons filed by the plaintiff on 19 November 1999 against the defendant and the first learned judge on 10 August 2000 dismissed the plaintiff's foreclosure proceedings with costs. Being aggrieved, the plaintiff filed the first appeal to the Court of Appeal against the decision of the first learned judge.

[81] The second appeal concerned a Civil Suit No: D5-22-363-2000 that was filed on 29 February 2000 and it was a tussle between AEH Capital Sdn Bhd as the plaintiff and AM-EL Holdings Sdn Bhd, Tempamas Sdn Bhd and Low Koon Chuan as the three defendants. The second learned judge who gave directions at case management level and proceeded to hear the civil suit without witnesses being called based on the written and

A the oral submissions of the parties was, unfortunately, transferred from Kuala Lumpur and, consequently, he did not decide the civil suit even though he had heard the matter substantially. The third learned judge who took over conduct of the civil suit refused to hear further oral submissions of the parties and on 21 June 2004, B the third learned judge allowed the plaintiff's claim with costs on a solicitor-client basis and dismissed the defendants' counter claim with costs. Being aggrieved, the defendants filed an appeal to the Court of Appeal against the whole decision of the third learned judge.

C

[82] It must be emphasised that the first learned judge who heard the foreclosure proceedings was not the same learned judge that disposed off the civil suit. And, for convenience, in this judgment, I shall refer the parties as they were when they appeared before D the learned judges in the foreclosure proceedings as well as in the civil suit.

The Conflicting Decisions Of The Learned Judges

[83] The parties herein were said to be in an incongruous E position by virtue of the conflicting decisions of the High Courts. Each party succeeded and failed in the courts of co-ordinate jurisdiction involving the same transaction with virtually identical issues to boot with. It was quite extraordinary that the plaintiff in the first appeal was prevented from realising its security in the F foreclosure proceedings and yet be permitted to execute against the defendants' other assets in the civil suit.

The First Appeal

G **[84]** The plaintiff, AEH Capital Sdn Bhd, was formerly known as Letac Credit Sdn Bhd. The plaintiff's exemption from the Moneylenders Act 1951 (Act 400) by the Minister of Housing and Local Government by virtue of s. 2A(2) of the said Act was gazetted in the Government Gazette No: P.U.(B)242 dated H 15 May 1996 as seen at pp. 279 to 280 of the appeal records for the foreclosure proceedings and for convenience it will be referred to as "AR1". The exemption was for a period of three years with effect from 9 March 1996 until 8 March 1999 provided that the activities of the moneylending shall be limited to:

I (i) credit leasing; and

(ii) share financing.

[85] By way of a letter dated 17 May 1996 as seen at p. 123 of "AR1" which is the same as p. 202 of the appeal records for the civil suit and for convenience it will be referred to as "AR2", the defendant applied to the plaintiff for a loan of RM4 million and offered as security, the following items:

(a) First party assignment dated 4 June 1996 (see pp. 171 to 193 of "AR1") over 47 units of condominiums known as Setapak Ria Condominium held under Master Title Geran 465, Lot 1130, Mukim of Setapak, Negeri Wilayah Persekutuan.

(b) An irrevocable call/put option to purchase 30% of the issued and fully paid shares of Mahabudi Development Sdn Bhd (hereinafter referred to as "Mahabudi") for RM4 million. This option shall be effective upon occurrence of a default of the loan.

(c) A corporate guarantee of Tempamas Sdn Bhd.

(d) A personal guarantee of Low Koon Chuan, Michael.

[86] The purpose of the loan, the rate of interest leviable, the advisory fee that is payable, the time of the drawdown, the tenure of repayment, the late interest to be imposed together with the other terms and conditions are all set out in the letter of offer dated 24 May 1996 as seen at pp. 124 to 130 of "AR1". It is ideal to reproduce them here and I shall do so now (the relevant parts only):

Amount	:	RM4,000,000.00 (Ringgit Four Million Only).
Purpose	:	To part finance purchase of the fully issued and paid-up capital of Mahabudi Development Sdn. Bhd.
Interest Rate	:	At 24.73% per annum ('Prescribed Rate') ie. RM748,000.00 (Ringgit Seven Hundred Forty Eight Thousand Only) and is payable upfront on the date of drawdown of TL.
Advisory Fee	:	At 4% on the loan amount ie. RM160,000.00 (Ringgit One Hundred Sixty Thousand Only) and is payable upfront on the date of drawdown of TL.

Drawdown	:	In one lump sum on June 5, 1996.
Tenure/ Repayment	:	Repayable in one lump sum 9 months from the date of first drawdown ie. March 5, 1997.
Late Interest	:	In addition and without prejudice to AEHC's powers, rights and remedies conferred herein, should there be any delay in payment of principal and/or interest under the terms and conditions of this Letter of Offer, the Borrower shall pay late interest on the outstanding amount up to the date of actual payment at 4% per annum above the Prescribed Rate, calculated on a daily basis.

[87] That letter of offer dated 24 May 1996 paved the way for the defendant to obtain the loan from the plaintiff. It was described as a term loan. The defendant's directors circular resolution in writing dated 27 May 1996 resolved to accept the term loan facility from the plaintiff upon the terms and conditions as stipulated in the letter of offer. The resolution can be seen at pp. 337 to 338 of "AR1" and it was worded in this way:

AM-EL Holdings Sdn. Bhd.
(Incorporated in Malaysia)
Directors' Circular Resolution In Writing
Made Pursuant To Article 90

We, the undersigned, being all the Directors of the Company, at this date, do pursuant to Article 90 of the Company's Articles of Association,

Resolve:

That approval be and is hereby given for the Company to accept the Term Loan facility of Ringgit Malaysia Four Million (RM4,000,000.00) only granted to the Company by AEH Capital Sdn. Bhd. upon the terms and conditions as set forth in their Letter of Offer, Reference: AEHC4608/ PL/DL/tja dated 24 May, 1996:

Amount
Ringgit Malaysia Four Million (RM4,000,000.00) only.

Purpose
To part finance the purchase of the fully issued and paid-up capital of Mahabudi Development Sdn. Bhd.

Interest Rate
At 24.73% per annum ('Prescribed Rate') ie. Ringgit Malaysia Seven Hundred And Forty Eight Thousand (RM748,000.00) only and is payable upfront on the date of drawdown of Term Loan.

Advisory Fee
At 4% flat on the loan amount ie. Ringgit Malaysia One Hundred And Sixty Thousand (RM160,000.00) only and is payable upfront on the date of drawdown of Term Loan.

Drawdown
In one lump sum on June 5, 1996.

Tenure/Repayment
Repayable in one lump sum 9 months from the date of first drawdown ie March 5, 1997.

Security

1. 1st party Loan Agreement Cum Assignment for RM4 million over 47 units of condominiums as follows:

Unit No.	Unit No.	Unit No.
D-20-1	C-2-8	B-6-2
D-20-2	D-1-1	D-1-4
D-20-3	C-2-7	D-6-5
C-24-3	A-19-3	A-4-1
C-24-4	B-20-2	C-22-6
C-24-2	B-20-4	B-13-3
C-23-1	C-15-7	A-12-2
C-18-4	D-6-3	A-12-3
C-6-4	D-18-4	B-13-1
C-6-3	B-16-3	B-6-4
C-4-3	C-4-4	C-23-3
B-1-1	B-1-2	B-1-4
B-2-1	B-2-2	B-2-4
B-3-2	B-4-1	B-4-2
B-4-4	B-5-1	A-10-2
A-11-2	A-11-3	

All held under the Master Title Geran 465, Lot 1130, Mukim of Setapak, Negeri Wilayah Persekutuan ('collectively known as the Condominiums').

2. Loan Agreement for RM4.0 million.

3. Call/Put Option Agreement. The Company shall grant a call/put option to AEHC for AEHC to buy 30% of the issued and fully paid shares of Mahabudi Development Sdn. Bhd. for RM4.0 million. The tenure of the call/put option will commence from the date of drawdown up to one (1) month after expiry of the Term Loan. This option is only effective upon occurrence of a default of the loan. This is an irrevocable Call/Put Option by the Company of AEHC.

4. Corporate Guarantee of Tempamas Sdn. Bhd. for the full amount of RM4,000,000.00 together with the Board resolution sanctioning the acceptance of this Corporate Guarantee.

5. Personal Guarantee of Mr. Low Koon Chuan (NRIC 420710-10-5351/1492262) for the full amount of RM4,000,000.00.

6. Duly executed Power of Attorney for the Loan Agreement cum Assignments.

7. Duly accepted Letter of Offer together with the Board Resolution sanctioning the acceptance of this offer.

And that the Common Seal of the Company be affixed to all the relevant legal documents in accordance with the provisions of the Company's Articles of Association.

Sgd. (Illegible) Mr. Michael Low Koon Chuan Director	Sgd. (Illegible) Mdm. Tan Siew Eng Director
Sgd. (Illegible) Miss Low Bee Leng Director	Sgd. (Illegible) Miss Low Bee Lay Director

Kuala Lumpur,
Dated: 27 May, 1996.

[88] The parties executed the loan agreement on 4 June 1996 as seen at pp. 133 to 168 of "AR1". Pursuant to section 6.04 of the loan agreement, the defendant had agreed to pay to the plaintiff all sums due and owing under the loan agreement by way of a lump sum repayment within nine (9) months from the date of

the release of the loan. And pursuant to section 10.01 (a) of the loan agreement, an event of default would occur, *inter alia*, when the defendant failed to make any repayment that has to be repaid in relation to the loan regardless of whether the amount has been formally demanded or not.

[89] Section 1.01 of the loan agreement (at p. 134 of "AR1") sets out the purpose of the loan and it is stated to be for the purchase by the defendant of Mahabudi shares. Section 2.01 of the loan agreement (at p. 136 of "AR1") categorically defined "Mahabudi" and "Mahabudi shares" in this way:

> 'Mahabudi' means Mahabudi Development Sdn Bhd a company incorporated in Malaysia with its registered address at Room 503, Merlin Tower, Jalan Meldrum, 80000 Johore Bahru, Johor.
>
> 'Mahabudi Shares' means the shares in Mahabudi purchased or to be purchased by the Borrower.

[90] Section 3.02 of the loan agreement also states the purpose of the loan in this way. That it "shall be used to part finance the purchase of all the shares in Mahabudi".

[91] There was a letter of indemnity emanating from Low Koon Chuan – the third defendant in the civil suit, addressed to the plaintiff wherein the third defendant covenanted to cause the defendant in the foreclosure proceedings to complete the purchase of the entire issued and fully paid shares of Mahabudi shares and in the event of non-completion the third defendant covenanted to indemnify the plaintiff of all losses. That letter of indemnity was dated 27 May 1996 and it can be seen at p. 393 of "AR2" and it was worded as follows:

> From : Mr Low Koon Chuan, Michael
> No. 1 Jalan SS22A/4,
> Damansara Jaya,
> 47400 Petaling Jaya,
> Selangor Darul Ehsan.
>
> Date : 27 May 1996
>
> To : AEH Capital Sdn Bhd
> Suite 6.01B, 6th Floor
> Wisma Equity,
> 150 Jalan Ampang,
> 50450 Kuala Lumpur.

Dear Sirs,

Re: Letter of Indemnity

In consideration of your agreeing at my request to grant the loan of RM4 million to AM-EL Holdings Sdn Bhd, I hereby covenant to cause AM-EL Holdings Sdn Bhd to complete the purchase of the entire issued and fully paid shares of Mahabudi Development Sdn Bhd and I indemnify you of all losses in the event of noncompletion.

Yours faithfully,

Sgd. (Illegible)
Low Koon Chuan, Michael
NRIC: 420710-10-5351/1492262.

[92] The drawdown notice from the defendant to the plaintiff dated 4 June 1996 can be seen at pp. 338 to 339 of the appeal record for the civil suit marked as "AR2". That drawdown notice make for an interesting reading material. It was worded in this way:

Re: Drawdown Notice
Ringgit Malaysia Four Million Only (RM4,000,000.00)
Letter of Offer dated May 24, 1996

We refer to the above.

In accordance with the terms and conditions of the Letter of Offer, we hereby give you notice that we wish to drawdown the above mentioned loan on June 5, 1996.

We hereby irrevocably authorise and instruct you to drawdown the above loan sum in the following manner:

1. a sum of RM3,042,000 to AM-EL Holdings Sdn Bhd;

2. a sum of RM748,000.00 to yourself to settle the upfront payment of interest in respect of the above loan;

3. a sum of RM160,000.00 to yourself to settle the upfront payment of advisory fee; (and)

4. a sum of RM50,000.00 to yourself as deposit for legal fees and stamp duty for the relevant documents.

We confirm that:-

a) no event of default as defined in the Loan Agreement and no event which with the giving notice or the lapse of time or both has occurred and is continuing as at the date hereof or has occurred and is continuing as at the date hereof or has occurred and is continuing or will have occurred on the date stated herein on which the drawing is to be made;

b) no extraordinary circumstances have occurred which will make it impossible for us to fulfill, perform and observe all the conditions, terms, covenants, agreements, stipulations, undertakings and obligations to be fulfilled, performed and observed by us under the terms of (the) security document;

c) the representations and warranties contained in the Loan Agreement are true and accurate in all respects in relation to the facts pertaining as at the date hereof as if (it) had been set out in full herein;

d) the disbursement of the drawing as per our instructions herein will (not) cause any of the representations and warranties contained in the Loan Agreement to be untrue or incorrect as if made at the date of such disbursement and there is so far as we are aware, no reason why we will not be permitted to make payment as required under the Loan Agreement; and

e) there has been no breach of default by us in fulfilling, performing and observing all the conditions, terms, agreements, convenants, stipulations, undertakings and obligations contained in the Loan Agreement and/or other security documents on our part to be fulfilled, performed and observed.

Yours faithfully,

AM-EL Holdings Sdn Bhd
Sgd. (Illegible)
Director
For and on behalf of AM-EL Development Sdn Bhd
Name: Low Koon Chuan
IC No: 420710-10-5351.

[93] By way of a letter dated 23 April 1997, the defendant expressed its wish to repay RM1.5 million to the plaintiff and also asked for an extension of time to repay the balance. That letter can be seen at p. 295 of "AR1" and it was worded in this way:

> Re: Term Loan of RM4 Million due to AEH Capital Sdn Bhd on April 25, 1997. Request for extension of RM2.5 Million for the period April 25, 1997 to October 31, 1997 and the option to extend a further 6 months ending 30 April 1997
>
> We refer to the above and wish to repay RM1.5 Million (Ringgit One Million Five Hundred Thousand Only) of the above mentioned term loan facility of RM4 Million (Ringgit Four Million Only).
>
> We hereby request for further extension of time to repay the outstanding balance of RM2.5 Million (Ringgit Two Million Five Hundred Thousand Only) for the period April 25, 1997 to October 31, 1997. We would also appreciate if you could consider to grant us another extension of six (6) months upon the expiry on October 31, 1997 - i.e. to extend to April 30, 1998.
>
> The guarantors, Mr Michael Low Koon Chuan and Tempamas Sdn Bhd have been advised on the extension and they are agreeable to extend their commitment on it.
>
> Your approval on the abovementioned request will be much appreciated.
>
> Yours faithfully
>
> Sgd. (Illegible)
> Michael Low Koon Chuan
> Director.

[94] By letter dated 24 April 1997, the plaintiff agreed to the defendant's request of extending the term for repayment of the RM2.5 million subject to the terms and conditions as set out in the letter of offer dated 24 May 1996. The plaintiff's letter dated 24.4.1997 can be seen at pp. 303 to 305 of "AR1" or at pp. 355 to 357 of "AR1" and it was worded in this way:

> **Re: Term Loan RM4 Million Further To Letter Of Offer Dated May 24, 1996. Extension of time to pay RM2.5 Million to AM-EL Holdings Sdn Bhd ('AHSB')**
>
> We refer to your request for extension of time to pay RM2.5 Million (Ringgit Two Million Five Hundred Thousand Only) due to us in your letter dated 23 April 1997.

We are pleased to advise that we are agreeable to extend the time for repayment of the RM2.5 Million due to us subject to the terms and conditions in our letter of offer dated May 24, 1996 and all security taken thereunder shall remain applicable except for the following:

Condition:
The guarantors Mr Michael Low Koon Chuan and Tempamas Sdn Bhd. agreed and acknowledge to this extension of payment and all the terms and conditions and all incidental security documentation pertaining to the loan.

Tenure:
The extension is for a period of 6 months commencing on April 25, 1997 and expiring on October 31, 1997. The loan may be extended for a further 6 months without any extension fee – i.e expiring on April 30, 1998 at our sole discretion.

Interest:
Interest of 16% per annum on the extension period (i.e. 189 calendar days) amounting to RM207,123.29 (Ringgit Two Hundred And Seven Thousand, One Hundred Twenty Three And Twenty Nine Cents Only) shall be paid upfront to AEH Capital Sdn Bhd ('AEHC'). This interest is computed on the daily outstanding balance of the loan and charged upfront.

Fee:
Non-refundable extension fee of 2% flat amounting to RM50,000.00 (Ringgit Fifty Thousand Only) shall be paid upfront to AEHC.

Prepayment:
Prepayment of loan is allowed subject to three (3) days notice and interest shall be calculated up to the date of full repayment.

Existing securities:
All securities provided to us and all our rights under the above Loan shall be continuing except for the following which, under this extension, we are prepared to waive:

1) The Call Option (expiring May 5, 1997) granted to AEHC to purchase 30% of the equity interest of Mahabudi Development Sdn Bhd for RM4 million for a tenure of 10 months.

2) The Grant of First Right of Refusal to AEHC to acquire Mahabudi Development Sdn Bhd in the event they decide to dispose Mahabudi to another listed company.

If the above is acceptable to you, kindly have your authorised signatory(ies) signify your acceptance by signing and returning the duplicate copy of this letter to us on or before 25 April 1997 together with all the relevant resolutions from yourselves and Tempamas Sdn Bhd (the corporate guarantor) sanctioning the acceptance of this letter and the terms and conditions herein, failing which this offer shall lapse.

Yours faithfully

Sgd. (Illegible)	Sgd. (Illegible)
Johari Low Abdullah @ Low Han Hing	Deniece Lim
Director	Director

We, AM-EL Holdings Sdn Bhd, hereby accept the above offer:
AM-EL Holdings Sdn. Bhd.

Sgd. (Illegible)
Michael KC Low
Name:
Designation:
Date: 24/4/97

Acknowledgement that there is no objection to the above terms and conditions:

Sgd. (Illegible)	Sgd. (Illegible)
Mr. Michael Low Koon Chuan	Tempamas Sdn Bhd
	(Authorised Signatory).

[95] On 24 April 1997, the first defendant re-paid the plaintiff the sum of RM1.5 million (see para 5 of the statement of agreed facts as seen at pp. 115 to 116 of "AR2"). Such re-payment too was also alluded to in the affidavit of Wong Yoke Weng, the executive director in charge of operation for the plaintiff, that was affirmed on 8 August 2000. And, of crucial importance, such re-payment was also averred by the plaintiff in its statement of claim at para 12 thereof (see p 51 of "AR2"). The re-payment of RM1.5 million was also averred at paras 8, 10 and 11 of the amended defence and counterclaim as seen at pp. 76 and 77 of "AR2".

[96] The defendant had breached the terms and conditions of the loan agreement when the defendant failed to settle the balance of the outstanding amount despite the demand made by the plaintiff. By a letter dated 3 February 1999 issued by the plaintiff's solicitors and addressed to the defendant, the plaintiff had claimed

from the defendant the sum of RM2,687,671.23 being the balance of the outstanding sum due and owing as at 15 December 1998 and which has to be settled within fourteen (14) days from the date of the aforesaid letter. That letter can be seen at p. 240 of "AR1" and it was worded as follows:

> **Re: Outstanding amount of RM2,687,671.23 as at 15th December 1998 which is due and owing to AEH Capital Sdn. Bhd.**
>
> We write in our capacity as solicitors for AEH CAPITAL SDN. BHD. of 3rd floor, Wisma Apex, 145A-C, Jalan Bukit, 43000 Kajang, Selangor Darul Ehsan.
>
> Our client instructs us that pursuant to the terms of a letter dated 24th May 1996 and also pursuant to a Loan Agreement dated 4th June 1996, our client had granted to you a term loan facility to the amount of RM4,000,000.00 ('the said loan facility') for the purpose of your purchase of shares in Mahabudi Development Sdn Bhd.
>
> Our client instructs us that the period for repayment under the said loan facility was extended by agreement until 31st July 1998. Our client further instructs us that you had failed to repay the amount then outstanding within the time agreed and our client had through a letter dated 21st September 1998, proceeded to terminate the said loan facility.
>
> TAKE NOTICE that we have been instructed to demand which we hereby (do) that you settle the outstanding amount pursuant to the said loan facility of RM2,687,671.23 as at 15th December 1998 together with all applicable interests and our costs of RM105.00 for issuing this notice within fourteen (14) days of the date hereof, failing which our client will initiate legal proceedings against you to recover the same without any further reference to you.
>
> Any part payment received will be accepted without prejudice to our client's right to proceed with or maintain any legal action to recover the balance.

[97] The defendant had failed, refused or neglected to pay the amount demanded by the plaintiff through its solicitors or any part thereof within the stipulated time period. It can readily be surmised that the failure, refusal or neglect to repay may be construed as a breach of the express term under the loan agreement. The terms

A are said to be expressed because they are specifically agreed upon by the parties. The terms and obligations undertaken by the parties are all set out in the loan agreement.

[98] Before I proceed any further, it would be ideal to dispose B off some legal technicalities that has surfaced in the course of narrating the facts of the case. The word "guarantee" – be it corporate or personal, appears and features prominently in the first appeal. It is the most common form of security. It is widely used in the commercial world today. Legally speaking, a guarantee may C be defined as a promise by an individual known as the "surety" or "guarantor" to be held responsible for the default of another individual known as the "principal debtor" to a third person known as the "creditor". In *P.J. Rajappa v. Associated Industries Pvt. Ltd. Quilon, 1* [1990] SC 162, the court held that a contract D of guarantee is a tripartite agreement involving the principal debtor, surety and the creditor. The courts in *Mathura Das v. Secretary of State*, AIR [1930] All 848; and in *Nandlal Chananbax v. Firm Kishin Chand* AIR [1937] Sindh 50 held that the contract of guarantee can be created either by parol or by written instrument and that E it may be express or it may be implied and inferred from the conduct of the parties. According to Bovill CJ in *Coles v. Pack* [1869] LR 5 CP 65 at p. 70 that in construing a contract of guarantee, it is always prudent to construe the document in question according to the intention of the parties as expressed by F the language that they have employed and try to understand it fairly in the sense it is used; and the intention of the parties can readily be ascertained by looking at the relative position of the parties at the time when the document is written. That would be to paraphrase what Bovill CJ said in that case. Certainly it involves G the question of the construction of the contract of guarantee by the court.

[99] Simply put, a guarantee is the undertaking that the debt shall be paid by the guarantor (*Campbell v. Mc Isaac* [1873] 9 H NSR 287). The distinctive feature of a contract of guarantee lies in the obligation which is assumed by the surety or guarantor (*Turner Manufacturing Co Pty Ltd v. Senes* [1964] NSWR 692; and *Coady v. J Lewis & Sons Ltd* [1951] 3 DLR 845). It is always prudent to remember that the existence of a guarantee does not I mean that the principal debtor is credit-worthy (*R v. Gurofsky* [1919] 16 OWN 19).

[100] On the other end of the scale, there is a contract of indemnity incurred by Low Koon Chuan – the third defendant in the civil suit. The contract of indemnity has been defined in *Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828 at 830-831, in *Total Oil Products (Aust) Pty Ltd v. Robinson* [1970] 1 NSWR 701 at 703; and in *Davys v. Buswell* [1913] 2 KB 47 at 53-55 as "a contract by one party to keep the other harmless against loss". Such an obligation has no reference at all to the debt of another (*Clipper Maritime Ltd v. Shirlstar Container Transport Ltd* [1987] 1 Lloyd's Rep 546 at 555; and *Harburg India Rubber Comb Co v. Martin* [1902] 1 KB 778 at 784).

[101] It is quite easy to identify a contract of indemnity as opposed to a contract of guarantee. The usage of the words "indemnity" or "guarantee" that appear in the instrument are clear indications of the intentions of the parties. One must determine the number of times, the expressions are being repeated (*Heald v. O' Connor* [1971] 1 WLR 497 at 503) or appear in the heading of the instrument itself (*Goulston Discount Ltd v. Clark* [1967] 2 QB 493 at 498 per Danckwerts LJ; *Western Credit Ltd v. Alberrry* [1964] 2 ALL ER 938 at 940 per Davies LJ; and *Crown Lumber Co Ltd v. Engel* [1961] 28 DLR (2d) 762). Sometimes, however, such an indication would not be decisive (*Total Oil Products (Aust) Pty Ltd v. Robinson (supra)*; and *Western Credit Ltd v. Alberry (supra)*) and the best approach would be to read and understand the document by looking for the essential nature of the document itself *(Yeoman Credit Ltd v. Latter (supra))*.

[102] The defendant repaid RM1.5 million to the plaintiff and the legal position of the guarantee would be reduced accordingly. This was the stand adopted by Lord Denning in *Standard Chartered v. Walker* [1982] 3 All ER 938 at 943:

> The guarantor is only under a secondary obligation to guarantee the debt of the principal debtor. If the principal debt is reduced for good reason, equally the guarantor's obligation is reduced. If there is a term in the contract to the contrary, it should be rejected as being repugnant or unreasonable.

[103] It must be emphasised that where the subject matter of the guarantee is the payment of a debt or a sum of money, then the understanding is this. If the principal debtor does not pay, then the surety or guarantor will have to pay. It is as simple as that.

A It is germane, at this juncture, to reproduce the speech of Baron Bayley in *Nicholson v. Paget* [1832] 1 Cr & M 48 at 52. This was what his Lordship said:

> Now this is a contract of guarantee, which is a contract of
B peculiar description; for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf; but it is a contract which he is entering into for a third person; and we think it is the duty of the party who takes such a security to see that it is couched in such words as the party so giving it may distinctly understand to what extent he is binding
C himself.

[104] Recently, Lord Nicholls of Birkenhead in the House of Lords in *Royal Bank of Scotland v. Etridge (No: 2)* [2001] 3 WLR 1021 at p. 1037 aptly said:

D
> The guarantor enters into the transaction at the request of the debtor. The guarantor assumes obligations. On the face of the transaction the guarantor usually receives no benefit in return, unless the guarantee is being given on a commercial basis. Leaving aside cases where the relationship between the surety and
E the debtor is commercial, a guarantee transaction is one-sided so far as the guarantor is concerned. The creditor knows this.

[105] In regard to the put option, I have this to say. It is an agreement where one party agrees to hold a particular obligation
F or to do a particular act or to purchase a particular property upon the happening of certain events or when the grantee requires that party to do it. Here, the put option was given as security for the due payment of the debt. It constitutes a guarantee or at least place the grantor of the option in the position of a surety or
G guarantor bearing in mind that the exercise of the put option by the plaintiff is expressly conditioned on the default of the defendant as the borrower (*Standard Chartered Bank Australia Ltd v. Greater Pacific Investments Ltd* [1991] 5 WAR 541; and *Mallett v. Bateman* [1865] LR 1 CP 163).

H **[106]** So much for the law. Reverting back to the factual matrix of the first appeal, it would be apparent that pursuant to s. 4(e) of the deed of assignment and as a result of the breach by the defendant, the plaintiff has the right, *inter alia*, to sell all the 47 condominium units in order to settle the amount outstanding
I under the loan. And by way of a letter dated 22 October 1999, the plaintiff through its solicitors had terminated the defendant's

licence to occupy the condominium units and claimed vacant possession of the condominium units. That letter can be seen at p. 245 of "AR1" and it was addressed to the defendant and it was worded as follows:

> **Re: Outstanding amount of RM2,687,671.23 as at 15th December 1998 which is due and owing to AEH Capital Sdn Bhd**
> **Deed of Assignment dated 4th June 1996**
>
> We refer to our letter dated 3rd February 1999.
>
> Our client instructs us that you have failed to settle the outstanding amount of RM2,687,671.23 as at 15th December 1998 together with accrued interests and legal fees within the time period stipulated therein.
>
> We have been instructed to notify you which we hereby do that your license to possess the properties referred to as Parcel Nos. A-4-1, A-10-2, A-11-2, A-11-3, A-12-2, A-12-3, A-19-3, B-1-1, B-1-2, B-1-4, B-2-1, B-2-2, B-2-4, B-3-2, B-4-1, B-4-2, B-4-4, B-5-1, B-6-2, B-6-4,B-13-1, B-13-3, B-16-3, B-20-2, B-20-4, C-2-7, C-2-8, C-4-3, C-4-4, C-6-3, C-6-4, C-15-7, C-18-4, C-22-6, C-23-1, C-23-3, C-24-2, C-24-3, C-24-4, D-1-1, D-1-4, D-6-3, D-6-5, D-18-4, D-20-1, D-20-2, D-20-3 all of which forms a part of Setapak Ria Condominiums erected on Master Title held under Geran Mukim 465 Lot 1130 Mukim Setapak, Negeri Wilayah Persekutuan is TERMINATED FORTHWITH.
>
> Kindly hand over vacant possession of the said properties to our client within seven (7) days of the date hereof. TAKE NOTICE that our client will be taking steps to sell the said properties under Clause 4 (e) of the Deed of Assignment dated 4th June 1996.

[107] In short, the plaintiff sought to foreclose all the 47 condominium units by way of an auction sale.

[108] The defendant challenged the foreclosure proceedings and alleged that the loan agreement dated 4 June 1996 as seen at pp. 133 to 168 of "AR1" failed to comply and/or was contrary to the requirements of the Moneylenders Act 1951 (Act 400) and accordingly it was a transaction that was unlawful, unconscionable, inequitable, invalid and unjust and should be set aside. The defendant took issue on the validity of the agreements relating to the loan. The defendant also averred that the plaintiff ought to exhibit all the agreements in connection with the loan granted to

A the defendant. The defendant further averred that the loan agreement cannot be enforced by the plaintiff because it was wrongful and should be rejected as an attempt to show a transaction that is valid when, in fact, it was not. It was averred further by the defendant that the interest imposed was excessive
B and inordinately high and was contrary to the provisions of the Moneylenders Act 1951 (Act 400). It was also said that the interest imposed upon interest was contrary to s. 11 of the Civil Law Act 1956 (Act 67). It was alleged that the plaintiff had also agreed orally that they would provide a proper statement of
C account and release 22 units of condominiums should the defendant effect payment of RM1.5 million. On 24 April 1997, the defendant effected payment of RM1.5 million but the plaintiff breached the said oral agreement. It was said that the failure on the part of the plaintiff to honour the oral agreement has resulted
D in severe loss to the defendant as well as depriving the defendant of the benefit of the sale of the 22 units of condominiums. All these averments were nicely worded by way of an affidavit in reply affirmed by Low Koon Chuan, the director of the defendant on 29 June 2000.

E

[109] The defendant further averred, through Low Koon Chuan, as follows. That the plaintiff has instituted civil proceedings in the Kuala Lumpur High Court *vide* no: D5-22-360-2000 (referring to the civil suit of the second appeal) against the defendant,
F Tempamas Sdn Bhd and Low Koon Chuan for the recovery of (see p. 260 of "AR1"):

(i) the balance sum of RM2,687,671.23 owed as at 15.12.1998;

(ii) interest on the sum of RM2,500,000.00 at the rate of
G 24.73% per annum from 16.12.1998 until full settlement;

(iii) costs on solicitors clients basis; and

(iv) such further or other relief as this Honourable Court deems fit and proper.

H

[110] It was also averred that the defendants in the second appeal have filed the statement of defence and the counterclaim. The defendant in the first appeal was advised to say that the "plaintiff who seeks equity must also do equity" and that the
I plaintiff must come to court with "clean hands". It was the stand of the defendant that the originating summons that housed the

foreclosure proceedings was defective, wrongful, invalid and failed to comply with the rules of the High Court. It was also the stand of the defendant that the plaintiff's affidavit in support was defective, wrongful, invalid and failed to comply with the rules of the High Court for the following reasons:

(i) the affidavit in support failed to disclose the amount that was owing (which the defendant denied) and is to be paid; and

(ii) the affidavit in support contained a notice in accordance with Order 83 of the Rules of the High Court 1980 ('RHC').

[111] By way of an affidavit styled as "affidavit III", the plaintiff through Wong Yoke Weng affirmed the said affidavit on 31 July 2000. In that affidavit, the particulars of the defendant's accounts were listed as follows:

(a) the total amount borrowed by the defendant is RM4 million;

(b) the total amount paid by the defendant as at the date of this affidavit, namely as at 26.6.2000 is RM2,845,808.85;

(c) the amount of outstanding interest calculated as at the date of the originating summons, namely as at 19.11.1999, is RM908,346.74;

(d) the amount of outstanding interest calculated as at the date of this affidavit, namely as at 31.7.2000, is RM1,523,674.41;

(e) the total interest per day accrued on the defendant's account, calculated from 1.7.2000 until 10.8.2000 is RM2,605.74; and

(f) the total loan outstanding including the interest accrued as at the date of hearing of the originating summons, namely as at 10.8.2000 is RM4,050,131.45.

[112] The first appeal revolved on the foreclosure proceedings and affidavits were exchanged between the parties. The first learned judge who heard the foreclosure proceedings had before him all the relevant affidavits.

[113] The following averments surfaced in the affidavit of Wong Yoke Weng, the executive director in charge of operation for the plaintiff, that was affirmed on 8 August 2000. The affidavit was styled as "affidavit IV". That affidavit also answered the second affidavit in reply of Low Koon Chuan that was affirmed on 7 August 2000. In "affidavit IV", it was averred that the plaintiff

had complied with the requirements of the law particularly the Moneylenders Act 1951 (Act 4000) in its business transaction with the defendant. It was also averred that the plaintiff is carrying on its business as a licensed moneylender under the Moneylenders Act 1951 (Act 400) and the plaintiff was under no obligation to inform the defendant of matters concerning the exemption granted to the plaintiff under s. 2A(2) of the Moneylenders Act 1951 (Act 400). According to the plaintiff, the exemption was subject to the terms and conditions as may be imposed by the Minister. The plaintiff denied that it had failed to comply with the terms and conditions imposed by the Minister. The plaintiff put the defendant to strict proof and imposed a heavy burden on the defendant to prove that the plaintiff had breached any of the terms and conditions. The plaintiff was advised to say by their solicitors that the action of the Minister in granting the plaintiff the exemption was not *ultra vires*. The plaintiff averred that the accusation by the defendant was an insult to the good name of the Minister who is not a party to these proceedings and who is unable to give any explanation. And the Minister had acted properly and validly when he granted the exemption. The plaintiff was advised to say that it has the right to rely on s. 2A(2) of the Moneylenders Act 1951 (Act 400) because as a licensed moneylender the plaintiff is subject to the provisions of the said Act including any exemption that has been granted by the Minister. The plaintiff was also advised to say that based on the conduct of the defendant, the principle of estoppel would be applicable. It was averred that the sum of RM1.5 million paid by the defendant was made as part repayment of the sum due and owing by the defendant to the plaintiff under the said loan. And that subsequent to the payment of RM1.5 million, the defendant was granted further extension of time by the plaintiff to settle the remaining outstanding sum under the said loan upon the terms and conditions therein stipulated which have been agreed upon by the defendant. Among the agreed terms, the defendant will pay additional fees and interest in respect of the further extension of time. It was averred that it was not stated in any of the letters of extension which has been agreed by the defendant that the sum of RM1.5 million paid by the defendant was to secure the release of 22 units of the condominiums. The plaintiff was advised to say that the defendant was estopped from stating that the payment of RM1.5 million was intended to secure the release of the 22 units

of the condominiums. It was averred that the defendant was estopped from adducing any oral agreement to contradict the express terms of the existing loan agreement. It was also averred that the defendant was estopped from denying the existence of the express terms and conditions as stipulated in the loan agreement.

[114] The first learned judge who heard the originating summons, in a short written judgment, dismissed the foreclosure proceedings with costs. His Lordship was of the view that the onus was on the plaintiff to produce evidence to satisfy the court that the purpose of the loan was for share financing. And that the plaintiff had also failed to annex any security documents to show that the loan was indeed for share financing. His Lordship felt that it was not sufficient to rely on the directors' circular resolution of the defendant which stated that the purpose of the loan was to part finance the purchase of the fully issued and paid-up capital of Mahabudi in the face of the specific challenge mounted by the defendant in regard to the ability of the plaintiff to take advantage of the exemption as provided by s. 2A(2) of the Moneylenders Act 1951 (Act 400). In the foreclosure proceedings, arguments pertaining to the payment by Hendersons (Malaysia) Sdn Bhd and in regard to the two (2) loans were not highlighted by the parties.

The Second Appeal

[115] Flowing from the foreclosure proceedings, the plaintiff filed the civil suit against the three defendants and this constituted the second appeal. The facts of the second appeal are the same as that of the first appeal and I shall not repeat them here unless they are necessary. Suffice for me to say that in the civil suit, the plaintiff claimed against the three defendants for the outstanding sum of RM2,687,671.23 owed as at 15 December 1998 together with interest at the rate of 24.73% per annum on the sum of RM2.5 million with effect from 16 December 1998 until the date of full settlement and costs on a solicitor client basis and such further or other relief as this Honourable Court deems fit and proper. The plaintiff's claim was based on a money-lending transaction between the plaintiff and the first defendant in the civil suit for a term loan facility of RM4 million for the purchase of 30% of the issued and paid-up shares of Mahabudi. As security for the said loan, the first defendant in the civil suit had assigned 47 units of condominiums to the plaintiff.

[116] The statement of agreed facts for the civil suit can be seen at pp. 115 to 116 of "AR2". Included in the statement of agreed facts was the averment that the plaintiff did not release 22 units of condominiums upon the receipt of RM1.5 million by the plaintiff from the first defendant in the civil suit on 25.4.1997. This meant that the parties agreed that 22 units of condominiums would be released to the first defendant by the plaintiff upon receipt of the RM1.5 million.

[117] The summary of the defence can be seen at pp. 119 to 121 of "AR2" while the summary of the counterclaim too can be seen towards the final part of p. 121 of "AR2". The defence has since been amended and in the amended statement of defence (see pp. 73 to 78 of "AR2"), the defendants in the civil suit required proof that the plaintiff has a valid exemption from the rigours of the Moneylending Act 1951 (Act 400). According to the defendants, the loan agreement was a mere illegal money-lending transaction and it was also harsh, unconscionable, unjust and wrongful for the following reasons:

(a) that the interest of 24.73% imposed on the loan was unreasonable, excessive, wrongful and illegal;

(b) that the payment of an "advisory fee" constituted a wrongful charge and an illegal benefit required by the plaintiff;

(c) that the payment of interest at the inception of the loan constituted a payment that has not accrued and, consequently, it was wrongful and illegal;

(d) that the plaintiff has failed to comply with the law in this case;

(e) that the plaintiff has failed to comply with the conditions precedent for the said loan; and

(f) that the said loan was not for the costs of the purchase of Mahabudi shares by the first defendant.

[118] The amended statement of defence in the civil suit further raised the following issues:

(a) that the guarantee and indemnity cannot be enforced because the loan was illegal;

(b) that there was no consideration for the guarantee and indemnity;

(c) that the plaintiff was in breach of their specific undertaking to release the 22 units of condominiums to the defendants upon the first defendant paying the sum of RM1.5 million thereby causing loss and damages to the first defendant;

(d) that the exemption granted to the plaintiff was *ultra vires* and that the loan was not confined to "credit leasing and share financing"; and

(e) that the alleged purchase of the shares in Mahabudi was a sham devised and relied upon by the plaintiff to grant a loan to the first defendant without complying with the provisions of the Moneylenders Act 1951 (Act 400).

[119] The amended counterclaim of the first defendant as reflected at pp. 78 to 81 of "AR2" may briefly be stated as follows:

(a) that since the loan transaction was wrongful, invalid, void and illegal and further since the exemption granted was invalid there was therefore no basis for the plaintiff's claim which was unenforceable;

(b) in the circumstances, the plaintiff was disentitled from relying on the exemption granted to blatantly contravene, at their whim, the provisions of the Moneylenders Act 1951 (Act 400); and

(c) that as a consequence of the invalidity of the said transactions, the failure and breach by the plaintiff as well as their other wrongful acts, the first defendant has been put to expense and has suffered loss and damage.

[120] The first defendant in its amended counterclaim itemised the particulars of special damages in this way (see p. 79 of "AR2"):

(i) Payment to solicitors Messrs Wong Lu Peen & Tunku Alina at RM49,947.

(ii) Costs of obtaining a legal opinion at RM50,000.

(iii) Legal fees and expenses incurred for the preparation of 25 assignments at RM31,250.

[121] There was also an averment in the amended counterclaim of the first defendant at p. 80 of "AR2" that despite the request of the first defendant, the plaintiff failed to provide a true and proper statement of account.

[122] And the first defendant sought for the following prayers in its amended counterclaim (see pp. 80 to 81 of "AR2"):

(A) Damages.

(B) Special damages at RM131,197.00.

(C) Declarations that:

(i) The loan agreement dated 4.6.1996 is wrongful, invalid and/or illegal in law.

(ii) The exemption granted to the plaintiff pursuant to section 2A(2) of the Moneylenders Act 1951 (Act 400) is wrongful and *ultra vires* the powers of the Minister granting it.

In the event the said declarations are made, a consequential order be given that the plaintiff is disentitled from enforcing any agreement relating to the loan granted to the first defendant on 4.6.1996.

(iii) Any guarantee and/or indemnity given by the second defendant and the third defendant to the plaintiff is void.

(D) The plaintiff do provide a true account of all payments received from the first defendant.

(E) Costs.

(F) Such other additional or alternative relief as the interests of justice may require.

[123] The reply to the amended defence can be seen at pp. 123 to 124 of "AR2" and they may be paraphrased in this way:

(a) That the plaintiff had been given the exemption by the Minister.

(b) That the loan granted to the first defendant complied with the Moneylenders Act 1951 (Act 400).

(c) That the first defendant wanted the loan for the purchase of the Mahabudi shares (see the first defendant's directors resolution dated 27 May 1996 and the loan agreement dated 4 June 1996 signed by the first defendant). A

(d) That the first defendant was estopped from denying the purpose of the loan. B

(e) That the first defendant should not be allowed to benefit from their own default and should not escape repayment of the balance loan. C

(f) The guarantee and indemnity were valid and enforceable.

(g) The plaintiff was not liable to ensure that the first defendant utilised the loan for the stated purpose for which they obtained the loan. D

(h) The plaintiff did not release the 22 units of condominiums because the first defendant failed to comply with their side of the bargain.

(i) No merits in the contentions that the exemption granted by the Minister was *ultra vires* and that the alleged purchase of the Mahabudi shares was a sham. The plaintiff was not obliged to ensure that the first defendant utilised the loan for the purchase of the Mahabudi shares. E F

[124] The defence to the amended counterclaim can be seen at p. 125 of "AR2" and there the plaintiff denied being liable to the defendants for any damages for reasons as stated in the reply to the amended defence and, consequently, for the same reasons the first defendant was not entitled to the declaration. G

[125] The parties were magnanimous. They agreed to resolve the civil suit based on three main issues, namely (see p. 137 of "AR2"):

(a) Whether the loan granted by the plaintiff as stated in the statement of claim was settled on 24 April 1997? H

(b) Whether a new loan without a valid exemption of the Minister operates with effect from 25 April 1997? I

(c) Whether the exemption granted to the plaintiff by the Minister of Housing and Local Government exempting the plaintiff from the provisions of the Moneylenders Act 1951 (Act 400) was *ultra vires*?

[126] At p. 152 of "AR2", the notes of evidence indicated that the third learned judge decided the civil suit entirely on the three main issues without calling witnesses and relied entirely on the written submissions prepared by the learned counsel on both sides. And at p. 153 of "AR2", the third learned judge announced his decision and allowed the plaintiff's claims with costs. The third learned judge also dismissed the first defendant's counterclaim with costs. The additional record of appeal enclosed the order of the third learned judge dated 21 June 2004 and for convenience it will be referred to as "AR3". The original text of the order dated 21 June 2004 reads as follows (see pp. 447 to 448 of "AR3", and obviously the reference to "defendan" must refer to the first defendant):

> MAKA ADALAH DIPERINTAHKAN bahawa tuntutan Plaintif iaitu:
>
> (a) jumlah wang sebanyak RM2,687,671.23 setakat 15.12.1998; dan
>
> (b) faedah ke atas jumlah sebanyak RM2,500,000.00 pada kadar 24.73% setahun bermula 16.12.1998 sehingga ke tarikh penyelesaian penuh dibenarkan dengan kos DAN ADALAH JUGA DIPERINTAHKAN bahawa tuntutan balas Defendan ditolak dengan kos.

[127] It must be emphasised that the plaintiff in its statement of claim did not disclose the payment of RM4 million by Hendersons (Malaysia) Sdn Bhd on 24.4.1997 nor did it disclose that the sum of RM2,242,876.71 that formed the second loan which was in favour of the first defendant was only debited from the plaintiff's bank account on 30 April 1997. These non-disclosures contravened O. 79 r. 3 of the RHC.

[128] The third learned judge in the civil suit in relation to the second appeal did not render a written judgment.

Analysis Of The First Appeal And The Second Appeal

[129] It was argued that the plaintiff's claim may be unenforceable due to illegality. It was emphasised that the plaintiff had breached the provisions of the Moneylenders Act 1951 (Act 400) at its own peril. It was pointed out that the plaintiff had, for instance, imposed an interest rate of 24.73% per annum on the loan to the first defendant. This was said to be excessive, harsh and unconscionable. According to the case of *Samuel v. Newbold* [1906] AC 461, the fact that excessive interest was charged might in itself be sufficient evidence of harshness and unconscionableness. It was also emphasised that the plaintiff had also imposed "advisory fees" and collected interest and "advisory fees" up front because only the sum of RM3,042,000 was drawndown on 5 June 1996 (see the cheque dated 5 June 1996 for RM3,042,000 at p. 344 of "AR2" as well as the payment voucher for the same amount at p. 343 of "AR2") and the acknowledgment can be seen at p. 342 of "AR2" and it was worded as follows:

AEH CAPITAL SDN BHD
(formerly known as Letac Credit Sdn Bhd)
(Licensed Moneylender)

June 5, 1996
AM-EL Holdings Sdn Bhd
No. 90 Jalan Alor,
50200 Kuala Lumpur
Attn. Mr Michael Low

Dear Sirs,

Re: Term Loan of RM4 Million

We refer to your drawdown instruction dated June 2, 1996 and are pleased to advise that the full loan of RM4,000,000.00 has been fully drawdown today ie. June 5, 1996. As per your instruction, we enclose herewith a cheque detailed as follows:

Bank : Bank Bumiputra Malaysia Berhad
Cheque
Number : 092675
Amount : RM3,042,000.00

The above mentioned RM3,042,000.00 is derived as follows:

(a)	Interest paid upfront:	RM 748,000.00
(b)	Advisory Fee:	RM 160,000.00
(c)	Legal Fee & Stamp Duty deposit:	RM 50,000.00
(d)	As balance of term loan of RM4 million paid to you:	RM3,042,000.00
	Total	RM4,000,000.00

Kindly acknowledge receipt by having your authorised signatory(ies) sign and return to us the duplicate copy of this letter and the attached payment voucher.

Yours faithfully,
Sgd. (Illegible)
Deniece Lim
Director

We hereby acknowledge receipt of the above:
AM-EL Holdings Sdn Bhd
Sgd. (Illegible)
Director
For and on behalf of AM-EL Holdings Sdn Bhd
Name : Low Koon Chuan
Designation: Executive Chairman
Date: 5/6/1996.

[130] Are the courts entitled to interfere with the freedom of contract that the parties are supposed to enjoy by questioning the harsh and unconscionable bargains that the parties have entered? There have been tell-tale signs of the resurgence of an equitable approach to unconscionable bargains as reflected in the dicta of Lord Simon of Glaisdale in *Shiloh Spinners Ltd. v. Harding* [1973] AC 691, 726; and in the speech of Lord Diplock in *A. Schroeder Music Publishing Co. v. Macaulay* [1974] 1 WLR 1308, 1315. And in *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britian) Ltd* [1985] 1 WLR 173, the Court of Appeal was quite magnanimous and did not rule out a broad doctrine of unconscionability even though it finally held that no unconscientious conduct had occurred. But, the recent cases have shown a trend to adhere firmly onto the principles of freedom of contract particularly in relation to commercial contracts between businessmen generally (*Multiservice Bookbinding Ltd. v. Marden* [1979] Ch. 84; and *Photo Productions Ltd. v. Securicor Transport Ltd.* [1980] AC 827). Earlier on in 1962, Lord Radcliffe in *Bridge v. Campbell Discount Co. Ltd.* [1962] AC 600, 626 re-emphasised the need to adhere religiously to the principles of freedom of contract.

[131] Here, the principles of freedom of contract must be adhered to. The parties willingly entered into the contract without any prompting from any third party. But the learned counsel for the first and the third defendants argued that the so called "transgressions" by the plaintiff may be excused if the plaintiff could validly rely on the exemption granted by the Minister. It was also argued that the Ministerial exemption was conditional and only applied to loans granted by the plaintiff for "credit leasing" or "share financing".

[132] The purpose of advancing the argument that the contract between the plaintiff and the first defendant in the second appeal was harsh and unconscionable was because of the stand by the first defendant that the contract ought to be set aside. Put differently, the first defendant in the second appeal challenged the loan agreement and sought for a declaration that the loan agreement was wrongful, invalid and/or illegal in law. Of course, if it can be shown that the plaintiff here engaged itself in unconscionable conduct or exerted an unconscientious use of power which must be characterised by some moral culpability or impropriety (*Alec Lobb (Garages) Ltd. v. Total Oil (Great Britian) Ltd (supra)* at p. 182) then the loan agreement may be set aside. The plaintiff must have behaved "in a morally reprehensible manner, that is to say, in a way which affects his conscience" (borrowing the words utilised in *Multiservice Bookbinding Ltd. v. Marden (supra)* at p. 110). And "the classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible, well-advised … person would have accepted" (again borrowing the words of *Multiservice Bookbinding Ltd. v. Marden (supra)* at p. 110). But, the facts as unfolded did not support the proposition that the plaintiff had acted in a reprehensible manner at par with the examples as illustrated by *Multiservice Bookbinding Ltd. v. Marden (supra)*. It is germane, at this juncture, to quote what Chong Siew Fai J (as he then was) said in *Fui Lian Credit & Leasing Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & 7 Ors.* [1991] 1 CLJ 522; [1991] 2 CLJ (Rep) 614:

> In order that a party may free himself from complying with an agreement he had entered into, he must show that the bargain or some of its terms was unfair and unconscionable. It is not enough to show that, in the eyes of the court, it was unreasonable. A bargain cannot be unfair and unconscionable unless it is shown

A that one of the parties to it has imposed an objectionable term in a morally reprehensible manner, that is to say, in a way which affects his conscience or has procured the bargain by some unfair means.

B **[133]** This was not the case of the "strong pushing the weak to the wall" (borrowing the words used in *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britian) Ltd (supra)* at p. 183).

[134] It must be emphasised that the doctrine of unconscionability was alluded to in the affidavit in reply of Low Koon Chuan that C was affirmed on 29 June 2000 as seen at pp. 69 to 72 of "AR1" at para 5(i) when the loan transaction was described as "unlawful, unconscionable and inequitable, invalid and unjust and should be set aside". It was also alluded to in the amended defence as seen at p. 74 of "AR2" at para 3 when the loan transaction was D described as "harsh, unconscionable, unjust and wrongful". The same cannot be said of the case of *Credit Lyonnais Bank Nederland NV v. Burch* [1997] 4 All ER 144 where Nourse LJ acknowledged that the doctrine of unconscionability was not pleaded but observed that "the unconscionability of the transaction remains of E direct materiality to the case based on undue influence" (see p. 151). Millett LJ's judgment in *Credit Lyonnais Bank Nederland NV v. Burch (supra)* at p. 153 went so far as to hold that the doctrine of undue influence can be advanced within the broader doctrine of unconscionability. This was what Millett LJ said:

F

> In such a context the two equitable jurisdictions (to set aside harsh and unconscionable bargains and to set aside transactions obtained by undue influence) have many similarities. In either case it is necessary to show that the conscience of the party who seeks to G uphold the transaction was affected by notice, actual or constructive, of the impropriety by which it was obtained by the intermediary, and in either case the court may in a proper case infer the presence of impropriety from the terms of the transaction itself.

H **[135]** From the above passage, it would appear that there are similarities between these two (2) equitable doctrines: undue influence and unconscionable bargain. Indeed, the doctrine of undue influence may be subsumed by the broader doctrine of unconscionability. A narrower scope of the doctrine of I unconscionability is the concept of inequality of bargaining power.

Lord Denning MR in *Lloyds Bank Ltd. v. Bundy* [1975] QB 326, had this to say about the concept of inequality of bargaining power (see p. 339):

> By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

[136] However, in these two (2) appeals before us, the facts speak for themselves. It is not disputed that the plaintiff is a licensed money-lending company. And, according to the statement of agreed facts at pp. 115 to 116 of "AR2", the plaintiff is exempted from the rigours of the Moneylenders Act 1951 (Act 400) by virtue of s. 2A(2) of the said Act and that exemption has been gazetted in the Government Gazette No: P.U(B) 242 dated 15 May 1996 for a period of three years. This meant that, at the material time, the exemption was still in force. Section 2A(2) of the Moneylenders Act 1951 (Act 400) enacts as follows:

> 2A(2) The Minister may:
>
> (a) in consideration of the special circumstances relating to the nature of the business of any company, or the objects of any society, and its financial standing; and
>
> (b) if he is satisfied that it would not be contrary to the public interest to do so,
>
> by notification in the Gazette exempt such company or society from all or any of the provisions of this Act, and such exemption shall be granted for such duration as may be specified in the notification, and may be made subject to such limitations, restrictions or conditions as the Minister may specify in the notification.

[137] And by virtue of s. 5(1) of the Moneylenders Act 1951 (Act 400), the plaintiff has been licensed to conduct business as a moneylender. The licenses have been exhibited and they can be seen at pp. 372, 389, 390 and 391 of "AR2". The gazette notification evidencing the exemption can be seen at pp. 279 to 280 of "AR1" and the exemption was given by the Minister of Housing and Local Government. Even the statement of agreed

facts mentioned the relevant Minister to be the Minister of Housing and Local Government. Yet, the learned counsel for the first and the third defendants in the second appeal and who also acted for the defendant in the first appeal argued that the "blanket" exemption was self defeating. He submitted that if the exemption was meant to exempt the plaintiff from the rigours of the Moneylenders Act 1951 (Act 400) then the plaintiff should not rely on s. 2A(2) of the said Act in order to obtain the exemption. It was like, according to him, "chopping off the hand that feeds you". He also submitted that the exemption as granted by the Minister was absurd, repugnant and inconsistent with the said Act as well as the Federal Constitution. According to him, it created a situation where Parliament could never possibly have intended. He submitted that should the exemption be valid then there was no necessity for the plaintiff to be licensed and the plaintiff would be permitted to flout the provisions of the said Act with impunity and the plaintiff would also be permitted to undertake the business of money-lending without even being a moneylender in law.

[138] By way of a rebuttal, I have this to say. It must be borne in mind that the Moneylenders Act 1951 (Act 400) strikes at moneylenders and not at money-lending. According to Salleh Abas FJ (as he then was) in *Ngui Mui Khin & Anor. v. Gillespie Bros & Co. Ltd* [1980] 2 MLJ 9, 12:

> At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to money-lending but only to moneylenders. It does not make every money-lending transaction illegal and unenforceable. It is only a money-lending transaction of a moneylender which is the subject matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court.

[139] And according to the same learned judge in the person of Salleh Abas FJ (as he then was) in the case of *Yeep Mooi v. Chu Chin Chua & Ors.* [1981] 1 MLJ 14, 15, 16:

> We have on another occasion observed that the Moneylenders Ordinance, 1951 does not strike at moneylending but at moneylenders and at the loans lent by them. The Ordinance is never intended to apply to an individual, or any member of the public who lends money even at interest, unless he does so as a business.

[140] As a business concern, the plaintiff has to make reference to the Moneylenders Act 1951 (Act 400) and to seek an exemption from the said Act by referring to the Minister of Housing and Local Government under s. 2A(2) of the said Act. There is no other statute that confers such an exemption like the Moneylenders Act 1951 (Act 400). This is not the case of "chopping off the hand that feeds you" situation but rather it is the law of the country. The Moneylenders Act 1951 (Act 400) have been enacted by the legislature for the protection of the borrowers and the moneylender has only himself to blame if he does not comply strictly with the provisions therein (*F.Xavier v. Kathamuthu Konar* [1958] MLJ 286; and *Ang Khye Pang v. Chop Ban Aik* [1939] MLJ 282). According to the case of *Kartar Singh v. Mahinder Singh* [1959] MLJ 248, moneylenders must learn the importance of strict compliance with the technical requirements of the Ordinance if they wish to recover their money. And according to Raja Azlan Shah J (as His Royal Highness then was) in *Overseas Union Finance Ltd. v. Lim Joo Chong* [1971] 2 MLJ 124, 126 that:

> This is indeed a lesson to be learnt by moneylenders in future to be more careful when lending money on a security and also to be sure that the Moneylenders Ordinance has been fully complied with. The Moneylenders Ordinance is calculated to protect borrowers from unscrupulous moneylenders but careless moneylenders are also caught by it.

[141] Finally, Smith J, in *Teja Singh v. K. Periasamy* [1958] 24 MLJ 81, 83 aptly said that the court may have sympathy for the moneylenders who may lose their claim on a technical ground but the court "cannot fly in the face of the Moneylenders Ordinance."

[142] All these authorities show the need to adhere strictly to the provisions of the Moneylenders Act 1951 (Act 400) and the plaintiff here has done just that.

[143] Next, it was argued that it should be the Minister of Finance and not the Minister of Housing and Local Government who should grant the exemption. Section 2A(2) of the Moneylenders Act 1951 (Act 400) allows the Minister to grant an exemption but it does not specify who this Minister is to be. The plaintiff relies on the Ministerial Functions Act, 1969 to assert that the Minister of Housing and Local Government is the correct Minister that is empowered. Section 2 of the Ministerial Functions Act 1969 enacts as follows:

2. Functions, styles and titles of Ministers

(1) The Yang di-Pertuan Agong may by order notify in the Gazette:

(a) that a Minister has been conferred with any functions or has been charged with any responsibility in respect of a particular department or subject or that any transfer, to any other Minister, of any of the functions or responsibility referred to has been made;

(b) that any style or title has been assigned to any Minister (except the Prime Minister) or that any change in any style and title referred to has been made.

[144] And by virtue of s. 2 of the Ministerial Functions Act 1969 as reproduced above, the Yang diPertuan Agong makes the following order which may be cited as the Ministers of the Federal Government Order 1983. Order 2 of the Ministers of the Federal Government Order 1983 states as follows (see the gazette notification dated 26 May 1983 *vide* P.U.(A) 202):

Ministerial functions.

2. It is notified that the persons named in the first column of the Schedule shall have the styles and titles of office and shall be charged with the responsibility for the departments and subjects specified in the corresponding second, third and fourth columns of the Schedule respectively and shall be assisted by the person or persons whose name or names appear in the first column of the Schedule underneath the names of the first-mentioned persons and who shall have the styles and titles of office specified in the corresponding second column of the Schedule.

[145] Now, looking at the Schedule at p. 830 of P.U.(A) 202, the Minister of Finance is empowered to handle matters pertaining to:

External and domestic loans.

Loans and financial guarantees pertaining to States, statutory bodies, corporations and other bodies.

[146] While the Schedule at p. 836 of P.U.(A) 202, the Minister of Housing and Local Government is empowered to handle matters pertaining to:

Pawnbrokers, moneylenders and money-lending.

[147] It is now correct to say that the exemption that was given to the plaintiff by virtue of s. 2A(2) of the Moneylenders Act 1951 (Act 400) by the Minister of Housing and Local Government was correctly done. We are concerned here with moneylenders and the right Minister has given the exemption.

[148] It was the first defendant who applied for the loan of RM4 million and the plaintiff granted the said loan. The first defendant had held out and represented to the plaintiff that the loan was for part financing of the purchase of Mahabudi shares. It was not the duty of the plaintiff to ensure that the loan was to be utilised for the purpose of purchasing the shares. The first defendant had from the outset held out the purpose of the loan but reneged on it. The first defendant agreed to the interest and advisory fees as set out in the letter of offer and the loan documentation. Even the directors resolution of the first defendant agreed to the interest rate and the advisory fee. The first defendant also agreed to and paid the agreed interest upfront. All these were the agreed terms and the first defendant cannot resile from it (*The Co-operative Central Bank Ltd. v. Realvest Properties Sdn Bhd* [1992] 3 CLJ 1485; [1992] 2 CLJ (Rep) 300; *Bumiputra Merchant Banker Berhad v. The Melewar Corporation Bhd. & 2 Ors.* [1990] 2 CLJ 30; [1990] 1 CLJ (Rep) 693 and *Yeoh Hooi Ing (as personal representative of the Estate of Tan Teong Soon, deceased) v. Cheung Kong Hotel Sdn Bhd* [1997] 1 AMR 744). Having agreed to all these terms it was pointless for the first defendant to argue that the loan of RM4 million for the purpose of purchasing the Mahabudi shares was a sham transaction. It was also pointless to argue that the plaintiff had exploited the first and the third defendants' then financial predicament by imposing exorbitant interest and charging advisory fee. This court would not lend its aid nor assist the first and the third defendants to take advantage of its own defaults or wrongs by relying on its own breaches in order to avoid its obligations (*Co-operative Central Bank Limited, The v. Feyen Development Sdn Bhd* [1995] 1 AMR 2751).

[149] Incidentally, there was no evidence to show that the plaintiff was in *pari delicto* and that they knew that when they loaned the money to the first defendant the latter did not intend to purchase the Mahabudi shares (*Ahmad bin Udoh & Anor. v. Ng Aik Chong* [1970] 1 MLJ 82, FC). For all intents and purposes, the loan that was granted to the first defendant was for the purchase of Mahabudi shares by the first defendant. The following compelling evidence would suffice to show the purpose of the loan:

(a) At p. 202 of "AR2" which is the same as p. 123 of "AR1", the first defendant applied by letter dated 17 May 1996 for RM4 million loan and stated in the letter that, *inter alia*, the first defendant will grant an irrevocable call/put option to the plaintiff to purchase 30% of Mahabudi shares. This meant that the first defendant was to purchase the Mahabudi shares from the owners and then grant the option to the plaintiff.

(b) At p. 245 of "AR2", the plaintiff's letter of offer dated 24 May 1996 where the purpose of the loan was also stated and that was to part finance the purchase of the fully issued and paid up capital of Mahabudi. The first defendant had also signed at the bottom of the letter of offer at p. 251 of "AR2".

(c) At pp. 256 to 257 of "AR2" which is the same as pp. 337 to 338 of "AR1" and that was the first defendant's circular resolution approving the loan for the purpose of part financing the purchase of Mahabudi shares.

(d) At pp. 260 to 294 of "AR2" which is the same as pp. 133 to 168 of "AR1", and that was the loan agreement dated 4 June 1996 and it repeated again the purpose of the loan.

(e) At pp. 330 to 335 of "AR2" which was the option agreement dated 4 June 1996 and again it repeated the purpose of the loan.

(f) At p. 337 of "AR2" which was a letter dated 4 June 1996 from the first defendant to the plaintiff entitled "First Refusal". By this letter, it showed that the first defendant had entered into a sale and purchase agreement to buy all the shares of Mahabudi.

(g) At p. 338 of "AR2", the drawdown notice from the first defendant to the plaintiff dated 4 June 1996 confirming compliance with the terms of the loan agreement.

(h) At p. 371 of "AR2", the statutory declaration dated 27 May 1998 of Low Koon Chuan – the third defendant, confirming that all the statements and information provided were true and continue to be true.

(i) At p. 393 of "AR2", which was the letter of indemnity of Low Koon Chuan alluding to the purchase of the Mahabudi shares.

[150] The first and the third defendants challenged the loan agreement and sought for a declaration that the loan agreement was wrongful, invalid and/or illegal in law. But they forgot that there was a statutory declaration of the third defendant – Low Koon Chuan, dated 27 May 1998 which whittled away their arguments. That statutory declaration was worded as follows (see p. 371 of "AR2"):

Statutory Declaration

I, LOW KOON CHUAN (NRIC NO: 420710-10-5351) of No. 1, Jalan SS 22A/4, Damansara Jaya, 47400 Petaling Jaya, a Director of AM-EL Holdings Sdn. Bhd. (Company No. 203745M) (hereinafter referred to as 'the Company') a company incorporated in Malaysia and having its registered address at No: 90, Jalan Alor, 50200 Kuala Lumpur do solemnly and sincerely declare that:

1. I am fully authorised by the Company to make this declaration.

2. By a loan agreement dated June 4, 1996 (hereinafter referred to as 'the Loan Agreement') entered into between the Company and AEH Capital Sdn. Bhd. ('the Lender') the Lender granted the Company a loan of RM4,000,000.00 ('the Loan').

3. The Company has made a partial repayment of RM1,500,000.00. The balance of the Loan of RM2,500,000.00 is payable by July 31, 1998 and the Company has applied for an extension of time to repay the balance of the Loan.

4. In support of the application for the extension of the Loan, I hereby declare that since the date of the Loan Agreement:-

(a) there has been no material change or circumstances in or affecting the Company or its subsidiaries and that the statements and information provided to the Lender in particular in the Loan Agreement and security documents were true and continue to be true in all material respects at the time of submission by the Company;

(b) all securities taken as security for the Loan Agreement including the assignment of 47 units of apartments at Setapak Ria held under Master Title Geran 465, Lot 1130, Mukim of Setapak, Wilayah Persekutuan are still intact;

(c) the Company's obligations under the Loan Agreement or any other document relating to the Loan continue to be valid, binding and enforceable in accordance with their terms;

(d) no litigation arbitration or administrative proceedings is current or pending or, so far as the Company is aware threatened (I) to restrain the entry into, exercise of its rights under and/or performance or enforcement of or compliance with its obligations under the Loan Agreement or any other document relating to the Loan or (II) which has or could have a material adverse effect on the Company.

AND I make this solemn declaration conscientiously believing the same to be true by virtue of the Statutory Declaration Act, 1960.

SUBSCRIBED and SOLEMNLY declared)
by the abovenamed LOW KOON CHUAN) Sgd. (Illegible)
in the State of Wilayah Persekutuan this)
27th day of MAY 1998)

Before me,

Sgd. (Illegible)
No. W 128
Haron Hashim
Pesuruhjaya Sumpah
Malaysia.

[151] When you talk about illegality, you must first ascertain (1) whether it is illegal at its inception and (2) whether it is illegal during performance. The first situation envisages the position where the contract is illegal at its inception or formation *(Levy v. Yates* [1838] 8 A & E 129). Whereas the second situation envisages the position where the contract is legal at its inception

or formation but is performed in a manner which is illegal (*Ashmore, Benson, Pease & Co. Ltd. v. A.V. Dawson Ltd.* [1973] 1 WLR 828). In both situations, the courts will not enforce the contract nor provide any other remedies arising out of the contract.

[152] According to Blackburn J in *Waugh v. Morris* [1873] LR 8 QB 202, 208 that, "Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not". And when a legislation prohibits the making of the contract then the contract is said to be illegal (*Mahamed v. Alaga & Co.* [1998] 2 All ER 720; and *Hughes v. Kingston upon Hull C.C.* [1999] 2 All ER 49). At common law, when the contract is meant to "rig the market" by offering inflated prices for shares in a certain company, that contract is illegal because it involves a criminal conspiracy (*Scott v. Brown* [1892] 2 QB 724). In what way the loan agreement here was said to be illegal has not been demonstrated. It was a loan agreement for the sum of RM4 million to purchase the Mahabudi shares. It was not a loan agreement to commit a crime or to commit a civil wrong. The commission of a legal wrong was never contemplated by the parties when they signed the loan agreement. It is a legally binding contract which is not prohibited by statute and it is enforceable unlike the case of *Chai Sau Yin v. Liew Kwee Sam* [1962] MLJ 152, PC.

[153] Next, the learned counsel for the first and the third defendants argued that there were two (2) loans. The first loan was for the sum of RM4 million which was granted to the first defendant on 4 June 1996 and drawdown on 5 June 1996 and it had been re-paid in full on 24 April 1997 in the sum of RM4 million by Hendersons (Malaysia) Sdn Bhd. The official receipt of the plaintiff *vide* no: 3009 evidencing such payment can be seen at p. 411 of "AR2" and I must reproduce it forthwith:

Official Receipt

No. 3009

AEH Capital Sdn Bhd
(No. Syarikat: 118735-K)
(formerly known as Letac Credit Sdn Bhd)
(Licensed Moneylender)
Suite 6.01B, 6th Floor, Wisma Equity,
150 Jalan Ampang, 50450 Kuala Lumpur, Malaysia
Tel: 03-2647625, 2647626 Fax:03-2647670

Date: 24/4/1997

Received from HENDERSONS (MALAYSIA) SDN BHD

The sum of ringgit FOUR MILLION ONLY

In payment of PRINCIPAL OUTSTANDING ON AM-EL HOLDINGS SDN BHD LOAN

Cash/Cheque No. 060311	AEH CAPITAL SDN BHD
This receipt is Valid	Sgd. (Illegible)
Subject to Clearance of	Authorised Signature.
your Cheque(s)	

[154] The official receipt as reproduced above showed that the payment by Hendersons (Malaysia) Sdn Bhd to the plaintiff in the sum or RM4 million was payment for the "principal outstanding on AM-EL Holdings Sdn Bhd loan" and it was for this reason that it was argued that the loan for RM4 million that was granted by the plaintiff to the first defendant on 4 June 1996 was settled and paid in full on 24 April 1997 by Hendersons (Malaysia) Sdn Bhd. The cheque butt to show the payment of RM4 million on 24 April 1997 can be seen at p. 428 of "AR2".

[155] The second loan, according to the learned counsel for the first and the third defendants, was for the sum of RM2,242,876.71 that was granted on 29 April 1997 to the first defendant by way of the plaintiff's cheque BBMB 138879 dated 25 April 1997 as seen at p. 443 of "AR2". The second loan was said to be granted on 29 April 1997 based on the payment voucher as seen at p. 445 of "AR2" and in that payment voucher the date of 29 April 1997 was deleted and substituted by the date 25 April 1997 and it was for this reason that the learned counsel for the first and the third defendants argued that there was a lapse of five (5) days between the repayment of the first loan and the granting of the second loan. And for the same reason it was also argued that the second loan could not and cannot be a continuation of the first loan which had been fully settled on 24 April 1997. It was emphasised that the plaintiff's cheque dated 25 April 1997 as seen at p. 443 of "AR2" to the first defendant was approved by the plaintiff's own payment voucher only on 29 April 1997 as seen at p. 445 of "AR2". It was also emphasised that the plaintiff's payment voucher contained an extraordinary alteration, that is, from the date "29 April 1997" to "25 April 1997".

[156] It was argued that on 29 April 1997 the plaintiff was not in a financial position to grant the second loan to the first defendant because the statement of account from the plaintiff's bank at p. 424 of "AR2" showed that the sum of RM2,242,876.71 was only cleared on 30 April 1997. In short, it was only 30 April 1997 that the second loan was debited from the plaintiff's account in favour of the first defendant. And the lapse of five (5) days between the full repayment of the first loan and the disbursement of RM2,242,876.71 established the existence of the second loan which was granted to the first defendant on 29 April 1997.

[157] It was the stand of the first and the third defendants that there had been no extension of the first loan as alleged by the plaintiff. And since the second loan was clearly neither for credit leasing nor share financing, it was submitted that the Moneylenders Act 1951 (Act 400) had been contravened thereby rendering the second loan illegal and unenforceable or at the very least against public policy. Of crucial importance were the following submissions. That neither the first loan nor the second loan could have been for the purchase of Mahabudi shares because on 24 March 1997 (see pp. 412 to 416 of "AR2") the plaintiff had granted a loan of RM35 million to Shardin bin Mohd Arshad to acquire the entire issued and paid up capital of Mahabudi during the tenure of the first loan. The loan to Shardin bin Mohd Arshad was fully settled on 16 April 1997 (see p. 418 of "AR2").

[158] By way of a rebuttal, the plaintiff had this to say. That for the very first time in the second affidavit in reply of Low Koon Chuan that was affirmed on 7 August 2000 as seen at paras 5 and 15 at pp. 91, 93 and 94 of "AR1" for the Malay language text and at pp. 98, 100 and 101 of "AR1" for the English language text the defence that the plaintiff had not purchased the Mahabudi shares was raised. It was too late in the day. The first defendant, after having agreed to and having executed all those documents as alluded to in the early part of this judgment and bearing in mind that Low Koon Chuan had sworn a statutory declaration on 27 May 1998, now state that the plaintiff did not purchase the Mahabudi shares. That was the unkindest cut of them all. The first defendant ought not to be allowed to raise that defence and rely on its own lies and defaults. The state of the law at the material time was that the security granted by an assignment must be considered as an equitable charge. And that

an absolute assignment would rank higher than a charge (*Pancaran Nilam (M) Sdn Bhd v. Malayan Banking Bhd* [2000] 4 CLJ 793, CA). In *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41, the Supreme Court held that in an absolute assignment the assignee had acquired all the interest of the assignor in the purchase agreement relating to immovable property. And that the chargor in order to oppose an order for sale being granted by the court must show cause to the contrary (*Kandiah Peter Kandiah v. Public Bank Bhd.* [1993] 4 CLJ 332, SC). Furthermore, any contractual claims or breaches that the chargor may have against the chargee cannot constitute cause to the contrary (*Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36, SC).

[159] The plaintiff did not disclose the repayment of RM4 million by Hendersons (Malaysia) Sdn Bhd at the foreclosure proceedings and at the civil suit. It was disclosed, however, by the first and the third defendants upon a motion in their behalf during the course of the civil suit. Such payment was not denied by the plaintiff.

[160] It was submitted that by virtue of the full payment, even if there was a purchase of the Mahabudi shares (which the first and the third defendants denied), it was clear that the whole transaction for the purchase of the said shares was completed. It was emphasised that the request for an extension of time to repay the balance of RM2.5 million till 30 April 1998 was nullified when full payment of the first loan was made by Hendersons (Malaysia) Sdn Bhd on 24 April 1997.

[161] Having perused through the evidence with a toothcomb, it was part and parcel of my judgment that there was no unconscionable conduct on the part of the plaintiff. And no undue influence had been exerted by the plaintiff. The loan agreement was not harsh and unconscionable. The loan agreement too was not wrongful, nor invalid, nor illegal. It was executed at arms length. The loan was meant for the purchase of the Mahabudi shares. It was legally done and therefore enforceable. The rate of interest was agreed by the first defendant and therefore it was not excessive nor harsh nor unconscionable. The advisory fees too have been agreed between the parties. The principles of freedom of contract have been vigorously applied in these appeals.

[162] The Ministerial exemption that was accorded to the plaintiff expired on 8 March 1999. And if this court were to accept the submissions of the learned counsel for the first and the third defendants that there were two (2) loans, these two (2) loans would technically still be covered by the Ministerial exemption. Now, evidence wise, the first loan was for the sum of RM4 million and there was a loan agreement for that purpose. The chronology of events surrounding the first loan would be as follows:

(a) On 4 June 1996, the loan agreement for RM4 million was executed.

(b) On 5 June 1996, a cheque for RM3,042,000 (after paying the agreed up front charges and fees) was issued to the first defendant.

(c) On 23 April 1997, the first defendant repaid RM1.5 million to the plaintiff and the first defendant requested to extend time to repay the balance of RM2.5 million by 30 April 1998 (the statement of agreed facts also mentioned about the first defendant repaying RM1.5 million to the plaintiff).

(d) On 24 April 1997 Hendersons (Malaysia) Sdn Bhd paid RM4 million to the plaintiff for payment of the loan amounting to RM4 million. The official receipt showed that the payment was for the "principal outstanding on AM-EL Holdings Sdn Bhd loan".

[163] Thus, calculation wise, the net result would be as follows:

RM1.5 million (paid by the first defendant)
RM 4 million + (payment by Hendersons (Malaysia) Sdn Bhd)
RM5.5 million (Total amount paid)
RM 4 million - (loan amount)
RM1.5 million (surplus amount)

[164] This meant that the first defendant had overpaid the plaintiff by RM1.5 million in respect of the first loan. This amount too would be more than sufficient to pay whatever interests that may be imposed by the plaintiff. And since the first loan had been repaid in full, there was no necessity to foreclose all the 47 condominium units by way of an auction sale. The evidence about the full re-payment of the first loan of RM4 million was not made

available to the first learned judge and his Lordship made no reference to it in his written judgment. To be fair to the first learned judge, there was no mention of the re-payment of RM4 million by Hendersons (Malaysia) Sdn Bhd in the statement of claim and in the amended defence and counterclaim. The observations of the late Sharma J, in *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196, should be highlighted. There his Lordship said:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

Here, the parties agreed, as stated earlier, to resolve the civil suit based on three main issues which included the question of the settlement of the loan on 24 April 1997 and that would also indirectly refer to the re-payment of RM4 million by Hendersons (Malaysia) Sdn Bhd on behalf of the first defendant to the plaintiff.

[165] In regard to the second loan which was for the sum of RM2,242,876.71, which sum was by way of a cheque dated 25 April 1997 (see p. 443 of "AR2") in favour of the first defendant from the plaintiff, it was not supported by any loan agreement. The payment voucher for the disbursement of the sum of RM2,242,876.71 stated that it was for the drawdown of the term loan. That payment voucher can be seen at p. 445 of "AR2" and it was worded in this way:

AEH Capital Sdn Bhd
(formerly known as Letac Credit Sdn Bhd)
Payment Voucher

Pay to : AM-EL Holdings Sdn Bhd

PV No : 35/97
Date : ~~29/4/97~~
25/4/97

Particulars of payment	Amount
Being drawdown of Term Loan as per memorandum attached	RM2,242,876.71
	RM2,242,876.71

Prepared by : Sgd. (Illegible)	Bank : BBMB, KL
Approved by: Sgd. (Illegible)	Cheque No: 138879
Received by : Sgd. (Illegible) Name	Account Use Only: Checked by: Posted by:

But the term loan for the sum of RM4 million had already been drawndown on 5 June 1996 and there was nothing left to drawdown again. Evidence wise, this cheque of RM2,242,876.71 was cleared on 30 April 1997 (see the plaintiff's bank account at p. 424 of "AR2"). There was no evidence that the second loan was meant for credit leasing or for share financing. In my judgment, as far as the second loan was concerned it was illegal and unenforceable. The same cannot be said about the first loan. In my judgment, the first loan had all the trappings of legality.

[166] Calculation wise, if the sum of RM2,242,876.71 is deducted by the sum of RM1.5 million, a sum of RM742,876.71 would remain and it is this sum which the plaintiff advanced to the first defendant on an *ex gratia* basis. In my judgment, the sum of RM742,876.71 must be construed to lie where it falls.

[167] You just cannot "sweep under the carpet", so to speak, the re-payments of RM1.5 million and RM4 million to the plaintiff. Such repayments must be construed in its correct perspective and when so construed, the net result would show that the loan of RM4 million had been re-paid in full to the plaintiff.

[168] For the reasons as adumbrated above, I must dismiss the plaintiff's appeal in regard to the foreclosure proceedings with costs and direct that the deposit be paid to the defendant. In regard to the first and the third defendants' appeal pertaining to the civil suit, I must allow that appeal with costs and direct that the deposit be refunded to the first and the third defendants. I would, accordingly, dismiss the first and the third defendants' counterclaim with costs since they have succeeded in their arguments pertaining to the second loan.

[169] My learned sister Zaleha Zahari JCA and my learned brother Md. Raus Sharif JCA have seen this judgment in draft and they have expressed their disagreement with it. And so I have the singular honour of writing this dissenting judgment. It has been most gratifying.